138-529
138-529

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 177.

HIRAM BARNEY, LATE COLLECTOR OF THE PORT OF NEW YORK, PLAINTIFF IN ERROR,

vs.

E. A. OELRICHS, HERMAN C. VON POST, AND GUSTAV SCHWAB.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 11, 1887.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 177.

HIRAM BARNEY, LATE COLLECTOR OF THE PORT OF NEW YORK, PLAINTIFF IN ERROR,

vs.

E. A. OELRICHS, HERMAN C. VON POST, AND GUSTAV SCHWAB.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

	Original.	Print.
Writ of error	1	1
Clerk's certificate and return	2	1
Summons	3	2
Notice of appearance	5	2
Certiorari	6	3
Declaration	8	3
Plea	12	5
Reply	14	5
Rejoinder	16	6
Order of reference to John I. Davenport	18	7
Affidavit of George Bliss	21	8
Stipulation for reference	22	8
Order of reference to Joseph M. Deuel	24	9
Order amending order of reference	26	10
Stipulation as to evidence	28	10
Report of referee	29	11
Order confirming report of referee	31	11
Judgment	33	12
Bill of exceptions	37	13
Order of reference to John I. Davenport	37	13
Order of reference to Joseph M. Deuel	40	15
Testimony of John V. Williams	42	15

	Original.	Print.
Testimony of John V. Williams	42	15
Letter Hiram Barney to Joseph M. Deuel, November 10, 1882	44	16
Testimony of Augustus Heydenreich	45	17
John C. Darrow	48	18
Almon W. Griswold	53	20
Hiram Barney	63	25
Plaintiffs' requests to find	67	27
Defendant's requests to find	73	29
Referee's report	76	31
Defendant's exceptions to referee's report	77	31
Opinion of Judge Wallace in Hennequin *et al. v.* Barney	78½	32
Order confirming referee's report	82	34
Testimony of I. Augustus Stanwood	84	35
Plaintiffs' Exhibit A, record in Supreme Court United States in Barney, late collector, *v.* Dale *et al.*, No. 138, October term, 1881	96	40
writ of error	97	40
clerk's certificate	97	40
summons	98	41
notice of appearance	98	41
certiorari	99	42
declaration	99	42
plea	101	44
reply	101	44
rejoinder	102	45
postea	103	47
consent to order of reference	103	47
order of reference	104	48
report of referee	104	48
statement annexed to referee's report	105	49
exceptions to report of referee	113	57
order confirming report of referee	114	58
satisfaction of judgment	114	58
citation	114	58
B, brief for plaintiff in error in Supreme Court United States in Barney, late collector, *v.* Dale *et al.*, No. 138, October term, 1881	116	60
C, mandate of Supreme Court United States in Barney, late collector, *v.* Dale *et al*	116	60
D, letter of George Bliss, United States attorney, to Secretary of Treasury, May 11, 1874.	118	61
E, letter of George Bliss, United States attorney, to Secretary of Treasury, June 4, 1874.	121	62
F, letter of Secretary of Treasury to Attorney-General, June 10, 1874	124	63
G, letter of Solicitor-General to Secretary of Treasury, June 25, 1874	126	64
H, letter of Secretary of Treasury to George Bliss, United States attorney, July 1, 1874	129	65
stipulation as to validity of protests	130	65
I', affidavit of George Bliss	131	66
I, letter of Solicitor of Treasury to George Bliss, United States attorney, May 11, 1875	132	66

	Original.	Print.
Plaintiffs' Exhibit I², notice of motion from George Bliss to A. W. Griswold, May 18, 1875	133	67
I³, order denying motion, May 24, 1875	135	67
K, letter of Assistant Secretary Treasury to collector of customs, February 16, 1885	136	68
L, letter of Assistant Secretary Treasury to A. W. Griswold, February 16, 1885	137	68
M, letter of Elihu Root, United States attorney, to A. W. Griswold, November 11, 1884	138	69
N, letter of A. W. Griswold to Elihu Root, United States attorney, November 12, 1884	139	69
O, letter of Acting Secretary of Treasury to collector of customs, April 12, 1883	142	70
P, letter of A. W. Griswold to Elihu Root, United States attorney, January 3, 1885	143	71
Q, letter of Elihu Root, United States attorney, to A. W. Griswold, January 6, 1885	144	71
R, letter of A. W. Griswold to Elihu Root, United States attorney, January 17, 1885	145	72
list of cases containing fees	146	72
S, letter of A. W. Griswold to Elihu Root, United States attorney, January 20, 1885	148	73
T, letter of Elihu Root, United States attorney, to A. W. Griswold, January 23, 1885	149	74
U, letter of A. W. Griswold to Elihu Root, January 24, 1885	150	74
V, letter of A. W. Griswold to Secretary of Treasury, February 11, 1885	151	75
Stipulation on bill of exceptions	152	75
Assignment of errors	153	75
Joinder in error	155	76
Citation	157	76
Proof of service of citation	158	77

1 UNITED STATES OF AMERICA, *ss.:*

The President of the United States to the judges of the circuit court of the United States for the southern district of New York greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court before you between E. A. Oelrichs, Herman C. Von Post, and Gustav Schwab, plaintiffs, and Hiram Barney, defendant, a manifest error hath happened, to the great damage of the said Hiram Barney, as by his complaint appears. We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October, eighteen hundred and eighty-seven, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done thereon to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the said Supreme Court, the 6th day of October, in the year of our Lord one thousand eight hundred and eighty-seven.

TIMOTHY GRIFFITH,
Clerk.

The foregoing writ is hereby allowed.

E. HENRY LACOMBE,
Circuit Judge.

2 UNITED STATES OF AMERICA,
Southern District of New York, ss.:

I, Timothy Griffith, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from three to one hundred and fifty-eight, inclusive, contain a true and complete transcript of the records and proceedings had in said court in the case of Hiram Barney, plaintiff in error, against E. A. Oelrichs, Herman C. Von Post, and Gustav Schwab, defendants in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed at the city of New York, in the southern district of New York, in the second circuit, this tenth day of October, in the year of our Lord one thousand eight hundred and eighty-seven, and of the Independence of the United States the one hundred and twelfth.

[SEAL.] TIMOTHY GRIFFITH,
Clerk.

(Indorsed:) N. S. 399. U. S. Supreme Court. Hiram Barney, plaintiff in error, against E. A. Oelrichs et al., defendants in error. Writ

of error. Due service of a copy of the within writ of error is hereby admitted this 6th day of October, 1887. Almon W. Griswold, attorney for defendants in error. United States circuit court. Filed Oct. 6, 1887. Timothy Griffith, clerk.

3 N. Y. Superior Court.

E. A. Oelrichs, Herman C. Voupost and Gustav Schwab. *against* Hiram Barney. } Summons for money demand on contract. (Com. not ser.)

To the above-named defendant:

You are hereby summoned and required to answer the complaint in this action, which will be filed in the office of the clerk of the superior court of New York City, at the City Hall in said city, and to serve a copy of your answer to the said complaint on the subscriber, at his office, No. 20 Nassau st., in said city, within twenty days after the service of this summons on you, exclusive of the day of such service; and if you fail to answer the said complaint within the time aforesaid, the plaintiffs in this action will take judgment against you for the sum of two thousand dollars, with interest from the eighth day of April, one thousand eight hundred and sixty-one, besides the costs of this action.

A. W. Griswold,
Plaintiffs' Att'y, 20 *Nassau St.*

Dated New York, March 27, 1868.

4 (Endorsed:) New York superior court. E. A. Oelrichs et. al. against Hiram Barney. Summons. A. W. Griswold, pl'ffs' att'y, New York. 186. Due service of a copy of the within is hereby acknowledged. Served April 16, '68. D.

5 New York superior court.

Hiram Barney *ads.* E. A. Oelrichs et al. } Notice of appearance.

Sir: You will please take notice that I am retained by and appear as attorney for Hiram Barney, the defendant in this action, and demand service of a bill of particulars of the plaintiffs' claim herein, and a copy of their complaint, upon me, at my office in the U. S. court buildings, Nos. 41 and 43 Chambers street, in the city of New York.

Yours, &c.,

Samuel G. Courtney,
Attorney for Defendant.

To A. W. Griswold, Esq.,
Plaintiffs' Attorney.

(Endorsed:) Superior court. Hiram Barney ads. E. A. Oelrichs et al. Notice of appearance. S. G. Courtney, defendant's attorney. Due service of a notice, of which the within is a copy, is hereby admitted. Dated New York, 186 . A. W. Griswold, esq. Rec'd Apr. 28, 1868. A. H.

6 The President of the United States of America to the judges of the superior court of the city of New York, greeting:

We, for certain reasons, being desirous that our circuit court of the United States for the southern district of New York, in the second circuit, shall be certified of a certain cause commenced before you, against Hiram Barney, defendant, by E. A. Oelrichs et al., plaintiffs, do therefore command you, that the record and proceedings in the said cause you distinctly and openly send to the said circuit court, at the city of New York, on the 11th day of May, 1868, as fully and amply as the same are remaining before you, by whatever names the said parties may be called therein, together with this writ, that our said court may cause to be further done thereupon what of right ought to be done.

Witness, Salmon P. Chase, esquire, Chief-Justice of the Supreme Court of the United States, the 2nd day of May, in the year one thousand eight hundred and sixty-eight.

[L. S.] KENNETH G. WHITE,
Clerk.

SAMUEL G. COURTNEY,
Defendant's Attorney.

(Endorsed:) U. S. circuit court. Hiram Barney ads. E. A. Oelrichs et al. Copy. Certiorari. S. G. Courtney, defendant's attorney:

7 Sir: Take notice that the within is a copy of a certiorari this day issued out of the circuit court of the United States for the southern district of New York. New York, May 2, 1868. Yours, &c., D. S. Dickinson, defendant's attorney. Due service of a copy of the within and of the above notice is hereby admitted. New York, 186 . A. W. Griswold, esq., plaintiffs' attorney. May 5, 1868. D.

8 U. S. circuit court.

E. A. OELRICHS ET AL.
vs.
HIRAM BARNEY.

Southern District of New York, ss:

The above-named plaintiffs come here into court, and by A. W. Griswold, their attorney, suggest and give the court now here to understand and be informed that heretofore, to wit, on the 16th day of April, 1868, last past, an action was commenced in the superior court of the city of New York, according to the laws of the State of New York, and the rules and practice of said court in such case made and provided, in favor and in the name of said plaintiffs against the defendant herein, upon and for the same cause of action hereinafter set forth, and the summons therein was filed in the clerk's office of the said superior court. That the defendant afterwards, by his attorney, duly appeared in said action, and such proceedings were thereupon had that afterwards, and on the 5th day of May, in the year of our Lord one thousand eight hundred and sixty-eight, the said action was in due form of law removed by writ of certiorari for further prosecution and trial into this court, according to the act of Congress in

such case made and provided; and the clerk of the said superior
9 court did hereupon return the said writ with the summons aforesaid,nd did file the same in this court, according to the course and practice of this court which allegations and suggestions the defendant does not deny, but admits the same to be true.

Wherefore, let the further proceedings and trial in this action against the defendant be continued in this court.

And the plaintiffs accordingly, by their attorney aforesaid, complain of the defendant herein in a plea of trespass on the case.

For that whereas the said defendant on the 16th day of April, one thousand eight hundred and sixty-eight, at the city of New York, in the southern district aforesaid, was indebted to the said plaintiffs in the sum of two thousand dollars, lawful money of the United States of America, for money before that time lent and advanced by the said plaintiffs to the said defendant and at the special instance and request of said defendant. And for other money by the said plaintiffs before that time paid, laid out, and expended for the said defendant, and at the request of the said defendant; and for other money by the said defendant before that time had and received to and for the use of the said plaintiffs. And being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then
10 and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the sum of money in this count mentioned, when the defendant should be thereunto afterwards requested. And whereas, also, the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, accounted, together with the said plaintiffs of and concerning divers other sums of money before that time due and owing from the said defendant to the said plaintiffs, and then and there being in arrear and unpaid, and upon such accounting the said defendant then and there was found to be in arrear and indebted to the said plaintiffs in the further sum of two thousand dollars of lawful money as aforesaid. And being so found in arrear and indebted to the said plaintiffs, the said defendant in the consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money last mentioned, when the said defendant should be thereunto afterwards requested.

Nevertheless the said defendant (although often requested, &c.) has not yet paid the said several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiffs, but to pay the same, or any part thereof, to the said plaintiffs the said defendant has hither-
11 to wholly refused, and still does refuse, to the damage of the said plaintiffs of two thousand dollars, and thereof the plaintiffs bring suit, &c.

A. W. GRISWOLD,
Attorney for plaintiffs.

(Endorsed:) U. S. circuit court. E. A. Oelrichs et al. vs. Hiram Barney. Declaration. A. W. Griswold, plaintiffs' attorney: Please take notice that on filing a declaration in this cause, with a copy whereof you are hereby served, a rule has been entered in the Book of Common Rules,

kept in the office of the clerk of this court, at the city of New York, requiring the within-named defendant to plead to said declaration in twenty days after service of copy thereof and notice of said rule or judgment on his attorney. New York, Nov. 4, 1869. A. W. Griswold, plaintiffs' att'y. Service of copy of within and of the above notice is admitted. Nov. 4, 1869. Edwards Pierrepont, deft. atty.

12 U. S. circuit court, southern district of New York.

HIRAM BARNEY *ads.* E. A. OELRICHS ET AL. } Plea.

And the said defendant, Hiram Barney, by Edwards Pierrepont, his attorney, comes and defends the wrong and injury, when, &c., and says that he did not undertake and promise in manner and form as the said plaintiffs in this suit have above thereof declared against the said defendant.

And for a further and other plea in this behalf the said defendant says that the said supposed causes of action did not, nor did any of them, accrue to the said plaintiffs at any time within six years next before the commencement of this suit, and this the said defendant is ready to verify, and of these he puts himself upon the country, and the said plaintiffs do the like, &c.

EDWARDS PIERREPONT,
Defendant's Attorney.

To A. W. GRISWOLD, Esq.
Plaintiffs' Attorney.

(Endorsed:) U. S. circuit court. Hiram Barney ads. E. A.
13 Oelrich et al. Plea. Edwards Pierrepont, attorney for defendant: You will please take notice that the plea of the defendant in the above cause, of which the within is a copy, was this day filed in the office of the clerk of the U. S. circuit court for the southern district of New York. New York, Nov. 15, 1869. Yours, &c., Edwards Pierrepont, defendant's attorney. To A. W. Griswold, plaintiffs' attorney. Rec'd Nov. 15, '69. A. H.

14 U. S. circuit court, southern district of New York.

E. A. OELRICHS ET AL. *vs.* HIRAM BARNEY. } Reply.

And the said plaintiffs as to the plea of the said defendant by him first above pleaded, and whereof he hath put himself upon the country, do the like.

And the said plaintiffs, as to the plea of the said defendant by him lastly above pleaded, say that the said plaintiffs, by reason of anything by the said defendant in that plea alleged, ought not to be barred from having and maintaining their aforesaid action thereof against the said defendant, because they say that after the said several causes of action in the said complaint mentioned had accrued to the said plaintiffs the said defendant

departed from and resided out of this State for several successive periods, amounting in the aggregate to twelve months, and this suit was brought within six years and twelve months after the said several causes of action, and each and every thereof accrued to these plaintiffs.

And this the said plaintiffs are ready to verify, wherefore they p'ay judgment and their damages by them sustained to be adjusted, &c.

A. W. GRISWOLD,
Plaintiffs' Attorney.

15 (Endorsed:) U. S. circuit court. E. A. Oelrich et al. vs. Hiram Barney. Reply. A. W. Griswold, plaintiffs' attorney. Due service of a copy of within reply is hereby admitted, dated November 30th, 1869. Edwards Pierrepont, defendant's attorney. Copy of within filed in clerk's office, Jan'y 15, 1870. A. H. E. P.

16 U. S. circuit court, southern district of New York.

E. A. OELRICHS & AL.
vs.
HIRAM BARNEY. } Rejoinder.

And the said defendant, as to the said replication of the said plaintiffs to the said second plea of the said defendant, says that the said plaintiffs ought not by reason of anything by them in that replication alleged to have or maintain their aforesaid action thereof against him, the said defendant, because he says that after the said several supposed causes of action in the said complaint mentioned had accrued to the said plaintiffs, and before the commencement of this suit, he, the said defendant, did not depart from and reside out of this State for several successive periods, amounting in the aggregate to twelve months, in manner and form as the said plaintiffs has above in their said replication in that behalf alleged. And of this he, the said defendant, puts himself upon the country, and the said plaintiffs do the like.

EDWARDS PIERREPONT,
Defendant's Attorney.

(Endorsed:) R. 2.35. U. S. circuit court, southern district of New York. E. A. Oelrichs & al. vs. Hiram Barney. Rejoinder. Edwards Pierrepont, defendant's attorney, to A. W. Griswold, ess., pl'ffs' att'y:

17 You will please take notice that the rejoinder of the defendant in the above cause, of which the within is a copy, was this day filed in the office of the clerk of the U. S. circuit court for the southern district of New York. New York, Jan. 31, 1870. Yours, &c., Edwards Pierrepont, def't's att'y.

18 Circuit court of the United States, southern district of New York.

F. Berly v. Augustus Schell.
Same v. Hiram Barney.
E. Blackburn et al. v. Same.
A. H. Hildick v. Same.
C. Le Boutillier et al. v. Same.
A. Rolker et al. v. Same.
F. Tomes et al. v. Same.
J. M. Pendleton v. Hiram Barney.
T. B. Merrick et al v. Hiram Barney.
E. A. Oelrichs et al v. Same.
S. W. Waterbury et al. v. Same.
C. Angrave v. Augustus Schell.
Geo. F. W. Bartels et al. v. Same.
George R. Sheldon v. Same.

Order of reference to John I. Davenport, esq., Dec. 19, 1876.

And other causes.

19 Upon the orders heretofore made herein, referring these actions to Edwards Pierrepont, esq., and upon reading and filing the affidavit of George Bliss, esq., and the stipulation on behalf of the respective parties to the above-entitled actions now pending in this court, to recover duties alleged to have been illegally exacted upon charges and commissions:

It appearing to the court that the assessment of the damages in each of the several causes will require the examination of long accounts, and of numerous invoices, entries, and other documents and papers, and the taking of the testimony of various witnesses touching the same:

Now, on motion of George Bliss, esq., counsel for the said several defendants, and Almon W. Griswold and E. Delafield Smith, esq., of counsel for the said several plaintiffs, appearing and not objecting thereto,

It is ordered by the said court now here that the orders heretofore made, referring the said several causes to Edwards Pierrepont, esq., be and they are hereby vacated and set aside, and the said causes are hereby referred to John I. Davenport, esq., as sole referee, to take proof of and ascertain the claim of the plaintiff or plaintiffs in each of the said several causes, with interest, for excess of duties upon such charges and commissions

20 which may be found to have been illegally exacted from plaintiffs, and paid under protest to defendants, and not barred by the statute of limitations, whenever the same has been pleaded, upon importations at the port of New York, specified in the several bills of particulars served, or to be served in said several causes.

The said referee shall proceed to determine and adjust the claims of the said several plaintiffs in accordance with the rules and decisions of this court in similar cases, so far as the same shall be found applicable to the said causes hereinabove named. And

It is further ordered, that said referee state and report the amounts ascertained by him on said several commissions and charges separately, and the facts found by him in respect thereto, and in respect to the protests touching the same.

The said referee shall give notice to the attorneys of the respective parties of the time and place of hearing therein, unless such notice shall be waived by said attorneys, and either party may, on the hearing before said referee, raise objections and exceptions, and the referee shall decide thereon, and either party may bring such objections and exceptions to a hearing before the court after the report of such referee, shall be filed, and for that purpose may require the referee to report the evidence or testimony taken in the case upon which the objection or exception arises, in such manner as the court shall direct, and copies of the protests filed therein respectively.

21 That said referee shall report in such cases with all convenient dispatch; and on the coming in of such report, and the decisions of such exceptions as may be taken thereto by either party, either party shall be at liberty to move for judgment or verdict for the amount as to the court shall seem meet. And

It is further ordered, that the compensation of said referee shall be determined by the court, after the coming in of his said reports, at such amounts as shall appear to such court to be just and proper.

Dated December 19, 1876.

(S'g'd.) SAM. BLATCHFORD.

E. C. M.
A true copy.

JOSEPH M. DEUEL,
Clerk.

U. S. Circuit Court.

F. BERLEY,
v.
AUGUSTUS SCHELL, AND 104 CASES against late Collector of this Port.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

22 George Bliss, being duly sworn, says, that these actions were heretofore referred to the Hon. Edwards Pierrepont; that on the appointment of Mr. Pierrepont, as Attorney-General, that gentleman notified deponent that he could not further serve as such referee, and requested that the order referring the cases to him might be vacated and the same referred to some one else, that deponent promised to procure the making of such an order; that before he had time to carry out his promise the Secretary of the Treasury stopped all proceedings in this class of actions by directing that the questions involved should be presented to the Supreme Court of the United States; that within a few weeks this direction has been revoked, and deponent has been directed to proceed with the disposition of this class of cases. To that end it is important that a new referee in these cases should be appointed.

GEORGE BLISS.

Sworn to before me, this 15th day of Dec., 1876.

J. M. DEUEL,
U. S. Comm'r., D. of N. Y.

UNITED STATES CIRCUIT COURT.

Southern District of New York:

It is stipulated and agreed that the order hereto annexed be entered by and with the consent and direction of the court, in each of the
23 above entitled causes (one hundred and five in all), and that, upon the entry of such order, the said several causes stand referred to John I. Davenport, esq., for the purposes and in the manner specified in said order.

Dated Dec. 18th, 1876.

GEORGE BLISS,
U. S. Attorney, Attorney for defendants in each of said causes.

ALMON W. GRISWOLD,
Attorney for plaintiffs in certain of said causes.

E. DELAFIELD SMITH,
Attorney for plaintiffs in certain of said causes.

24 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second district held at the United States court rooms, in the city of New York, on the day of August, in the year of our Lord one thousand eight hundred and eighty-two. Present: The honorable William J. Wallace, circuit judge.

In the matter of the adjustment of certain cases against collectors of customs, heretofore referred to John I. Davenport, esq., for adjustment.

On reading and filing plaintiffs' notice of motion, dated August 5th, 1882 for the appointment of a referee in the place and stead of John I. Davenport, esq., in the cases referred to him, by two orders, made December 4th, 1874, entitled, respectively, B. H. Hutton, survivor, vs. Lucretia Bronson, executrix, and other cases, and H. De Goer et al. vs. Augustus Schell, and other cases; and also by order made December 19th, 1876, entitled F. Berly vs. Augustus Schell, and other cases, in which A. W. Griswold, esq., appears as attorney of record for the plaintiffs, and the case of
25 George F. W. Bartels, et al. vs. Augustus Schell, O. S., 1623, in which Messrs. Marsh, Wilson & Wallis appear as attorneys of record for plaintiffs; and the affidavit of A. W. Griswold, esq., sworn to August 5th, 1882; and after hearing A. W. Griswold, esq., counsel for the plaintiffs, and S. L. Woodford, esq., United States attorney and attorney for the defendants, upon said motion, it is

Ordered, That such of said cases as remain unadjusted and not discontinued, or not otherwise disposed of, be, and the same are hereby, to stand referred to Joseph M. Deuel, esq., clerk of this court, in the place and stead of John I. Davenport, esq., at the compensation of thirty-five dollars for each and every case hereafter adjusted by said referee, such sum being agreed upon between the parties, but without prejudice to the right of the defendants therein to move to have any of said cases restored to the calendar for trial by jury should the court deem such restoration just and proper.

WM. J. WALLACE.

(Endorsed:) U. S. circuit court, southern district of New York. In the matter of the adjustment of certain cases against collectors of customs, heretofore referred to John I. Davenport, esq., for adjustment. Order. S. L. Woodford, U. S. att'y. Filed in court, Aug. 10, 1882. Joseph M. Deuel, clerk. (Seal.)

26 U. S. circuit court, southern district of New York.

H. HENNEQUIN ET AL
vs.
HIRAM BARNEY. } N. S. 396.

On reading and filing the defendant's two notices of motion herein, dated respectively September 29th and October 10th, 1882, and after hearing Stewart L. Woodford, esq., U. S. attorney, represented by T. Greenwood, esq., and E. M. Moore, esq., in favor of said motion, and A. W. Griswold, esq., in opposition thereto, and due deliberation had, it is

Ordered, That the three orders heretofore made by this court, two of which on the 4th day of December, 1874, and the third on December 19th, 1876, by which this case and others were referred by John I. Davenport, esq., as referee, to compute the amount due the plaintiffs for excess of duty paid on charges and commissions, be amended by inserting after the words "specified in the several bills of particulars served or to be served in said several causes," near the bottom of the second page of said order, the following: "said referee to allow to the defendant
27 in such adjustment in each case, all payments or refunds, if any, which may have been made to the plaintiffs, either voluntarily or in prior suit, on account of excess of duties on charges or commissions, or both." And

It is further ordered, that in all other respects the motion herein is denied.

Nov. 11, 1882.

WM. J. WALLACE,

(A copy.)
[L. S.]
G. E. R.

JOSEPH M. DEUEL, *Clerk.*

28 U. S. circuit court, southern district of New York.

EDWIN A. OELRICHS ET AL.
vs.
HIRAM BARNEY. } N. S. 399.

It is stipulated that the evidence taken and offered in the case of Hennequim vs. Barney, subject to the objections and rulings made to its admission concerning the statute of limitations, be considered as applying with equal force to this case.

The above is a copy of the stipulation made before the referee by counsel for the respective parties on February 8th, 1883.

29 U. S. circuit court, southern district of New York,

E. A. OELRICHS ET AL.
vs.
HIRAM BARNEY. } N. S. 399.

To the court:

In obedience to the order of the court of August 10th, 1882, by which this cause was referred to me to adjust the amount, if any, to which the plaintiffs are entitled, I herewith report that I have been attended by counsel for the respective parties, and have taken and considered the testimony and exhibits that have been offered.

I find and report therefrom that, upon the importations specified in plaintiffs' bill of particulars, they are entitled to recover of the defendant the sum of four hundred and six dollars and eighty-five cents, as and for duties on charges and commissions upon such importations in excess of the amount lawfully due thereon, and which said amount was illegally exacted by the defendant from and paid by said plaintiffs under protest duly made to the defendant in writing; that in addition thereto the plaintiffs are entitled to recover the sum of five hundred and ninety-two dollars and forty-six cents, being the amount of interest on the various items
30 constituting the principal sum, from the date of their respective payments to the date of this report, which said principal and interest amount in the aggregate to the sum of nine hundred and ninety-nine dollars and thirty-one cents.

A detailed statement of the amounts so paid, as aforesaid, to the defendant was prepared by an officer of the custom-house, and proven before me.

Certain requests as to findings were submitted in writing by counsel, which are returned herewith with my action thereon noted.

All of which is respectfully submitted.

New York, October 3rd, 1884.

J. M. DEUEL,
Referee.

(Endorsed:) U. S. circuit court. So. dist. of New York. E. A. Oelrichs et al. vs. Hiram Barney. N. S. 399. Referee's report.

31 U. S. circuit court, southern district of New York.

E. A. OELRICHS ET AL.
vs.
HIRAM BARNEY. } N. S. 399.

This cause coming on to be heard upon exceptions filed by defendant to the report of J. M. Deuel, esq., the referee, filed herein October 8th, 1884, and after hearing Thomas Greenwood, esq., representing Elihu Root, esq., U. S. attorney, for defendant, and A. W. Griswold, esq., attorney for the plaintiffs, and due deliberation had, it is

Ordered, That the defendant's exceptions to the referee's report be overruled, and the said report be and the same is hereby confirmed.

Dated October 21, 1885.

WM. J. WALLACE.

(Endorsed:) Filed Oct. 24, 1885. Exd. T. A copy. Timothy Griffith, clerk.

(Endorsed:) N. S. 399. U. S. Circuit Court, southern dist. of New York. E. A. Oelrichs et al vs. Hiram Barney. Order confirming ref-
32 eree's report. (Certified copy). A. W. Griswold, plffs' atty. Service of a copy admitted. Dated Nov. 2nd, 1885. Wm. Dorsheimer, U. S. attorney, atty. for deft.

33 At a stated term of the circuit court of the United States of America, for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Monday the 18th day of January in the year of our Lord one thousand eight hundred and eighty-six.

Present: The Honorable Hoyt H. Wheeler, sitting as circuit judge.

EDWIN A. OELRICH, HERMAN C. VAN POST, and Gustav Schwab,
vs.
HIRAM BARNEY.
} N. S. 319.

Now come the plaintiffs by Almon W. Griswold, esq., their attorney, and move the trial of this cause. Likewise comes the defendant by Thomas Greenwood, esq., asst. U. S. atty., his attorney.

Thereupon a jury is empaneled, and the cause proceeds to trial.

After hearing the evidence of the parties and the argument of counsel, the court directs the jury to find a verdict for the plaintiffs for the amount of $289.12 for fees; and a verdict for the plaintiffs for the amount of $1,076.74 on the referee's report.

Thereupon the jury render a verdict whereby they find for the
34 plaintiffs in the amount of $289.12 for fees, and for the plaintiffs in the amount of $1,076.74 on the referee's report.

It is ordered, that a certificate of probable cause be entered herein, and that the defendant have a stay of proceedings on said verdict for thirty days.

And the said defendant, by the U. S. district attorney, his attorney, comes and defends the wrong and injury, &c., and says, that he did not undertake and promise in manner and form as the said plaintiffs have above thereof declared against him, and of this he puts himself upon the country, &c.

And the said plaintiffs and defendant having so stipulated in writing, the court ordered the issue above joined as to duties overpaid by plaintiffs on charges and commissions to be referred for trial to Joseph M. Deuel, esq., as referee, and the said referee, upon due notice, having heard the respective parties, made his report, filed in the office of the clerk of this court, on October 8th, 1884, by which he found in favor of the plaintiffs for the sum of nine hundred and ninety-nine and $\frac{31}{100}$ dollars, paid as and for duties on charges and commissions, as of October 3rd, 1884.

And the issue above joined as to excess of fees overpaid by
35 plaintiffs is ordered by the said court, to be tried at a circuit court appointed to be held at the U. S. court building in the city of New

York, on the third Monday of October in the year one thousand eight hundred and eighty-five.

And now at this day, to wit, the 18th day of January, 1886, being as yet of the said October term, 1885, before the said judge at the U. S. court building in the said city of New York, came the said parties by their attorneys aforesaid; and the said circuit judge, before whom the said issue was tried, has sent hither his record had before him in these words, to wit:

Afterwards, that is to say, on the day and at the place within contained, before Hoyt H. Wheeler, esq., judge of the district court for the district of Vermont, duly assigned to hold this court, came as well the within-named plaintiffs as the said defendant, by their respective attorneys within mentioned; and the jurors of the jury whereof mention is within made, being summoned also came, who, to speak the truth in the matters within contained being chosen, tried, and sworn upon their oaths, and under the direction of the court, did find for the plaintiffs in the sum of one thousand and seventy-six and $\frac{74}{100}$ dollars, as and for duties overpaid on charges and commissions.

And also under the direction of the court, the jury did find for the plaintiffs in the sum of two hundred and eighty-nine and $\frac{12}{100}$ dollars, as and for fees overpaid.

36 And they accordingly assess the damages of the said plaintiffs by reason of the premises at the sum of thirteen hundred and sixty-five and $\frac{86}{100}$ dollars, and interest, one hundred and thirty-four and $\frac{31}{100}$ dollars, over and above their costs and charges by them about their suit in this behalf expended, and for those costs and charges, the sum of eighty-five and $\frac{97}{100}$ dollars.

Therefore it is considered that the said plaintiffs recover against said defendant their damages and interest aforesaid, by the jurors aforesaid, in form aforesaid, found, and also their costs and charges of increase by the court, now here adjudged to the said plaintiffs with their assent, which said damages, interest, costs, and charges in the whole amount to fifteen hundred and eighty-six and $\frac{14}{100}$ dollars.

Judgment signed this eighth day of September, A. D. 1887.

TIMOTHY GRIFFITH,
Clerk.

(Endorsed): N. S. 319. U. S. circuit court, southern district of New York. E. A. Oelrichs et al., vs. Hiram Barney. Judgment roll. A. W. Griswold, plffs' atty. U. S. circuit court, filed September 8, 1887, 12 m. Timothy Griffith, clerk.

37 United States circuit court, southern district of New York.

E. A. OELRICHS ET AL.
vs.
HIRAM BARNEY. } N. S. 399.

Defendant's bill of exceptions.

Afterwards, to wit, on the 19th day of December, 1876, at a stated term of this court, begun and holden on the third Monday of October, 1876, the Honorable Samuel Blatchford sitting as a circuit judge, upon the consent

(Endorsed:) Filed Oct. 24, 1885. Exd. T. A copy. Timothy Griffith, clerk.

(Endorsed:) N. S. 399. U. S. Circuit Court, southern dist. of New York. E. A. Oelrichs et al vs. Hiram Barney. Order confirming ref-
32 eree's report. (Certified copy). A. W. Griswold, plffs' atty. Service of a copy admitted. Dated Nov. 2nd, 1885. Wm. Dorsheimer, U. S. attorney, atty. for deft.

33 At a stated term of the circuit court of the United States of America, for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Monday the 18th day of January in the year of our Lord one thousand eight hundred and eighty-six.

Present: The Honorable Hoyt H. Wheeler, sitting as circuit judge.

EDWIN A. OELRICH, HERMAN C. VAN POST, and Gustav Schwab, *vs.* HIRAM BARNEY. } N. S. 319.

Now come the plaintiffs by Almon W. Griswold, esq., their attorney, and move the trial of this cause. Likewise comes the defendant by Thomas Greenwood, esq., asst. U. S. atty., his attorney.

Thereupon a jury is empaneled, and the cause proceeds to trial.

After hearing the evidence of the parties and the argument of counsel, the court directs the jury to find a verdict for the plaintiffs for the amount of $289.12 for fees; and a verdict for the plaintiffs for the amount of $1,076.74 on the referee's report.

Thereupon the jury render a verdict whereby they find for the
34 plaintiffs in the amount of $289.12 for fees, and for the plaintiffs in the amount of $1,076.74 on the referee's report.

It is ordered, that a certificate of probable cause be entered herein, and that the defendant have a stay of proceedings on said verdict for thirty days.

And the said defendant, by the U. S. district attorney, his attorney, comes and defends the wrong and injury, &c., and says, that he did not undertake and promise in manner and form as the said plaintiffs have above thereof declared against him, and of this he puts himself upon the country, &c.

And the said plaintiffs and defendant having so stipulated in writing, the court ordered the issue above joined as to duties overpaid by plaintiffs on charges and commissions to be referred for trial to Joseph M. Deuel, esq., as referee, and the said referee, upon due notice, having heard the respective parties, made his report, filed in the office of the clerk of this court, on October 8th, 1884, by which he found in favor of the plaintiffs for the sum of nine hundred and ninety-nine and $\frac{31}{100}$ dollars, paid as and for duties on charges and commissions, as of October 3rd, 1884.

And the issue above joined as to excess of fees overpaid by
35 plaintiffs is ordered by the said court, to be tried at a circuit court appointed to be held at the U. S. court building in the city of New

York, on the third Monday of October in the year one thousand eight hundred and eighty-five.

And now at this day, to wit, the 18th day of January, 1886, being as yet of the said October term, 1885, before the said judge at the U. S. court building in the said city of New York, came the said parties by their attorneys aforesaid; and the said circuit judge, before whom the said issue was tried, has sent hither his record had before him in these words, to wit:

Afterwards, that is to say, on the day and at the place within contained, before Hoyt H. Wheeler, esq., judge of the district court for the district of Vermont, duly assigned to hold this court, came as well the within-named plaintiffs as the said defendant, by their respective attorneys within mentioned; and the jurors of the jury whereof mention is within made, being summoned also came, who, to speak the truth in the matters within contained being chosen, tried, and sworn upon their oaths, and under the direction of the court, did find for the plaintiffs in the sum of one thousand and seventy-six and $\frac{74}{100}$ dollars, as and for duties overpaid on charges and commissions.

And also under the direction of the court, the jury did find for the plaintiffs in the sum of two hundred and eighty-nine and $\frac{12}{100}$ dollars, as and for fees overpaid.

36 And they accordingly assess the damages of the said plaintiffs by reason of the premises at the sum of thirteen hundred and sixty-five and $\frac{86}{100}$ dollars, and interest, one hundred and thirty-four and $\frac{31}{100}$ dollars, over and above their costs and charges by them about their suit in this behalf expended, and for those costs and charges, the sum of eighty-five and $\frac{97}{100}$ dollars.

Therefore it is considered that the said plaintiffs recover against said defendant their damages and interest aforesaid, by the jurors aforesaid, in form aforesaid, found, and also their costs and charges of increase by the court, now here adjudged to the said plaintiffs with their assent, which said damages, interest, costs, and charges in the whole amount to fifteen hundred and eighty-six and $\frac{14}{100}$ dollars.

Judgment signed this eighth day of September, A. D. 1887.

TIMOTHY GRIFFITH,
Clerk.

(Endorsed): N. S. 319. U. S. circuit court, southern district of New York. E. A. Oelrichs et al., vs. Hiram Barney. Judgment roll. A. W. Griswold, plffs' atty. U. S. circuit court, filed September 8, 1887, 12 m. Timothy Griffith, clerk.

37 United States circuit court, southern district of New York.

E. A. OELRICHS ET AL.
vs.
HIRAM BARNEY. } N. S. 399.

Defendant's bill of exceptions.

Afterwards, to wit, on the 19th day of December, 1876, at a stated term of this court, begun and holden on the third Monday of October, 1876, the Honorable Samuel Blatchford sitting as a circuit judge, upon the consent

of the attorneys for the respective parties to this action, made an order, of which the following is a copy:

United States circuit court, southern district of New York.

E. A. OELRICHS ET AL.
vs.
HIRAM BARNEY.

38 Upon the orders heretofore made herein referring these actions to Edwards Pierrepont, esq., and upon reading and filing the affidavit of George Bliss, esq., and the stipulation on behalf of the respective parties to the above-entitled actions now pending in this court, to recover duties alleged to have been illegally exacted upon charges and commissions, it appearing to the court that the assessment of the damages in each of the several causes will require the examination of long accounts and of numerous invoices, entries, and other documents and papers, and the taking of the testimony of various witnesses touching the same:

Now, on motion of George Bliss, esq., counsel for the several defendants, and Almon W. Griswold and E. Delafield Smith, of counsel for the said several plaintiffs, appearing and not objecting thereto,

It is ordered by the said court now here that the orders heretofore made, referring the said several causes to Edwards Pierrepont, esq., be, and they are hereby, vacated and set aside, and the said causes are hereby referred to John I. Davenport, esq., as sole referee, to take proofs of and ascertain the claims of the plaintiff or plaintiffs in each of the said several causes, with interest, for excess of duties upon such charges and commissions which may be found to have been illegally exacted from plaintiffs and paid under protest to defendants, and not barred by the statute of limitations whenever the same has been pleaded upon importations at the port of New York, specified in the several bills of particulars served,
39 or to be served, in said several causes. The said referee shall proceed to determine and adjust the claims of the said several plaintiffs in accordance with the rules and decisions of this court in similar cases, so far as the same shall be found applicable to the said causes hereinabove named.

And it is further ordered that said referee state and report the amounts ascertained by him on said several commissions and charges separately, and the facts found by him in respect thereto, and in respect to the protests touching the same. The said referee shall give notice to the attorneys of the respective parties of the time and place of hearing therein, unless such notice shall be waived by said attorneys, and either party may on the hearing before said referee raise objections and exceptions, and the referee shall decide thereon, and either party may bring such objections and exceptions to a hearing before the court after the report of such referee shall be filed, and for that purpose may require the referee to report the evidence or testimony taken in the case upon which the objection or exception arises, in such manner as the court shall direct, and copies of the protests filed therein respectively. That said referee shall report in such cases with all convenient dispatch, and on the coming in of such report and the decision of such exceptions as may be taken thereto by either party,

either party shall be at liberty to move for judgment or verdict for such amount as to the court may seem just.

And it is further ordered that the compensation of said referee shall be determined by the court after the coming in of his said reports
40 at such amount as shall appear to such court to be just and proper
Dated December 19, 1876.

SAM'L BLATCHFORD."

Afterwards, to wit, on the 10th day of August, 1882, upon motion of the plaintiffs at a stated term, of this court begun and holden on the first Monday of April, 1882, the honorable William J. Wallace, circuit judge, made an order, of which the following is a copy:

"At a stated term of the circuit court of the United States of America for the southern district of New York, in the second district, held at the United States court-rooms, in the city of New York, on the —— day of August, in the year of our Lord one thousand eight hundred and eighty-two. Present: The honorable William J. Wallace, circuit judge.

"In the matter of the adjustment of certain cases against collectors of customs, heretofore referred to John I. Davenport, esq., for adjustment.

On reading and filing plaintiff's notice of motion, dated August 5th, 1882, for the appointment of a referee in the place and stead of John I. Davenport, esq., in the cases referred to him, by two orders, made
41 December 4th, 1874, entitled respectively, B. H. Hutton, survivor, vs. Lucretia Bronson, executrix, and other cases, and H. De Goer et al. vs. Augustus Schell, and other cases; and also by order made December 19th, 1876, entitled F. Berly vs. Augustus Schell, and other cases, in which A. W. Griswold, esq., appears as attorney of record for the plaintiffs, and the case of George F. W. Bartels et al. vs. Augustus Schell, O. S. 1623, in which Messrs. Marsh, Wilson & Wallis appear as attorneys of record for the plaintiffs; and the affidavit of A. W. Griswold, esq., sworn to August 5th, 1882; and after hearing A. W. Griswold, esq., counsel for the plaintiffs, and S. L. Woodford, esq., United States attorney and attorney for the defendants upon said motion—

"It is ordered, that such of said cases as remain unadjusted and not discontinued, or not otherwise disposed of, be, and the same are hereby to stand referred to Joseph M. Deuel, esq., clerk of this court, in the place and stead of John I. Davenport, esq., at the compensation of thirty-five dollars for each and every case hereafter adjusted by said referee, such sum being agreed upon between the parties, but without prejudice to the right of the defendants therein to move to have any of said cases restored to the calendar for trial by jury, should the court deem such restoration just and proper.

"WM. J. WALLACE."

42 Afterwards, to wit, on the 8th day of February, 1883, and the 8th day of July, and the 8th and 15th day of September, 1884, pursuant to the aforesaid orders, this cause came on for hearing before the referee named in the last-mentioned order, the plaintiffs being represented by their counsel and the defendant by his counsel; and to maintain the issues specified in said order on their behalf the plaintiffs produced testi-

mony tending to show that from about January 23, 1861, to about September 8, 1864, they imported from certain foreign countries into the United States, at the port of New York, certain merchandise.

That the said defendant, as collector of customs at said port, exacted certain duties upon the costs or charges of transportation of said merchandise from the interior of the countries in which the same was purchased by the plaintiffs to the vessels which brought the same to the United States, and upon certain commissions above the usual rate claimed by the plaintiffs in the case of the same.

That pursuant to the act of February 26, 1845 (5 U. S. Statutes at Large, p. 727, chap. 22), plaintiffs duly protested against the exaction of the aforesaid duty.

Plaintiffs then produced as a witness in their behalf, John V. Williams, who, being duly sworn, testified that he was and for thirteen years past had been a clerk in the custom-house in the city of New York;

43 that he had adjusted the amount of duties paid by the plaintiffs to the defendant, as such collector, upon the aforesaid costs or charges and commissions, and that the amount of said duties so paid was $406.85, and that the interest thereon from the respective dates of payment of said duties to December 31, 1879, at seven per centum per annum, was $476.26, amounting, with the aforesaid principal sum, to $883.10.

The witness on cross-examination testified: That of the aforesaid duties the sum of $44.30 was paid prior to April 16, 1862, as follows:

The sum of $32.40 was paid May 2, 1861, in the case of merchandise imported by the John Leslie, May 2, 1861; the sum of $0.60 was paid May 17, 1861, in the case of merchandise imported by the Sea Vulture, May 17, 1861; the sum of $0.80 was paid September 19, 1861, in the case of merchandise imported by the August, September 19, 1861; that the sum of $3.00 was paid January 29, 1862, in the case of merchandise by the Elizabeth D. Hart; and that the sum of $7.50 was paid March 15, 1862, in the case of merchandise imported by the Bremen, March 15, 1862. That the interest on the said sum of $44.30 from the respective dates of payment thereof to December 31, 1879, at seven per centum per annum was $58.12, amounting, principal and interest, at the last-mentioned date to the sum of $102.42.

Plaintiffs then offered in evidence a letter from the defendant, Hiram Barney, to Joseph M. Deuel, the referee, bearing date of November 10th, 1882.

44 To the admission in evidence of this letter the defendant by his counsel objected on the ground,

First. That it was immaterial, irrelevant, and incompetent.

Second. That it was not the best evidence and no attempts have been shown to produce the defendant as a witness or to account for his absence; therefore that said letter was not competent evidence.

Third. That the letter showed on its face that the absences of the defendant, Hiram Barney, were temporary, and that he did not at any time since this action accrued reside out of the State of New York.

The referee overruled these objections, and to this ruling the defendant by his counsel excepted; which exception was duly noted and allowed.

This letter was thereupon admitted in evidence as an admission in writing of the defendant and the following is a copy thereof:

U. S. circuit court, southern district of New York.

E. A. OELRICHS ET AL., *vs.* HIRAM BARNEY. } N. S. 399.

JOSEPH M. DEUEL, Esq., *Referee, &c.:*

SIR: In regard to the sum of my absences from this State, from
45 the 10th day of April, 1861, to the 10th day of April, 1868, I will state that my absences during the period mentioned were all temporary, and, though frequent, were for short periods, varying from one day to perhaps forty or fifty days.

There were very few, probably not more than two or three, as long as forty days, and I should think not more than one as long as fifty days. They consist mainly of brief visits to Washington during the first four years, and of visits to Iowa and Wisconsin and South during the following years.

I have no memoranda of these absences, at least no full memoranda, and I could not ascertain so as to state positively the sum of them. I can only estimate them, and this I do at an average of two months a year.

New York, Nov. 10th, 1882.

Respectfully, yours,

HIRAM BARNEY.

Signed J. M. D., ref.

The plaintiffs then produced as a witness in their behalf Augustus Heydenreich, who, being duly sworn, testified: That in 1866, 7, and 8, he was in the employ of Almon W. Griswold; that he prepared the summons in this action, which he stated he then held in his hand, on March 27, 1868.

That in 1866 he had prepared a summons in this case and about forty others against the same defendant; that he did not know what he did with the summons prepared by him in 1866, but he presumed he tore it up.

46 The witness was then asked the following question:

"Q. Did you make any efforts, and if so what efforts, to serve said summons?"

To this question the defendant, by his counsel, objected.

First. On the ground that the same was incompetent, irrelevant, and immaterial.

And, second, on the ground that the law of the State of New York in force at such time, to suspend the running of the statute of limitations required the summons in the suit to be put in the hands of the sheriff or other authorized officer, and that it did not appear that the witness was such sheriff or other authorized officer.

Plaintiffs thereupon admitted that the witness was not at that time sheriff or coroner! that he held no office under the State, city, or county of New York, except that of notary public.

These objections the referree overruled, and to this ruling the defendant, by his counsel, excepted, which exception was duly noted and allowed.

The witness answered: That immediately after preparing this summons in 1866 he endeavored to serve the defendant at his office, No. 111 Broadway, in this city (New York), but that he was informed that the defendant was out of the State; that he went there a number of times to serve him, but did not serve him till the fore part of 1868; that he carried a batch of summonses in his pocket, and a Mr. Darrow carried a
47 batch in his pocket, each looking out for an opportunity to serve Mr. Barney; that Mr. Darrow seemed to have served the summons in this case.

The witness then testified he could not state definitely how many times between 1866 and 1868 he went to Mr. Barney's office, 111 Broadway, to serve the summons, but he knew it was a number of times; that he remembered on one occasion he was informed that Mr. Barney would not return for three or four months; and at other times he was told that he would not return for some time, but he did not remember the length of time; that he tore up the summons made by him in 1866, because he had so frequently changed the date of it; that he thought it proper to prepare new ones.

Witness Heydenreich on cross-examination testified: That he could not state how many times during 1866, 1867, and 1868 he had endeavored to serve the defendant with a summons in this action. That he could not state how many times he had made such endeavor in 1866; he knew he went there several times. That he would not say that he had made such endeavors six times in 1866. He did not think he had as often as that. That he would hardly say that he had made such endeavors six times in 1867. That he would not say he had six times in January, February, and March, of 1868; he had not as often as that. That he would state that during the same period Mr. Darrow made attempts to serve Mr. Barney when witness would not go; that he did not know of his own knowledge that Mr. Darrow made this attempt only so far as Mr. Darrow informed him. That Mr. Darrow had a batch of summonses in his pocket and was trying to serve defendant. That between Mr. Dar-
48 row and witness there were over forty summonses against the defendant to be served. The question was then put to him whether he had endeavored to serve the defendant as many as four times in each of the years 1866, 1867, and 1868. Witness answered that it was so long ago he could not answer further than he had. He kept no memoranda of his attempts to serve him. That during these years he never made any attempt to serve the defendant at any other place than at 111 Broadway, in the city of New York. That at the time he erased the date in the summons as originally made out, and inserted from time to time new dates, he was a boy and thought it necessary. That he never made any attempt to serve the defendant prior to 1866 in this action.

The witness on redirect examination then testified: That between 1866 and 1868 he thought he went to Mr. Barney's office to serve the summons in this action at least over a half a dozen times, perhaps more. That he could not recollect whether these visits to Mr. Barney's office were made the latter part of this period or first part.

The plaintiffs then produced as witness in their behalf John C. Darrow,

who, being duly sworn, testified: That he resided in Westchester County, New York; that Peekskill was his post-office address. That he was a lawyer by profession. That in 1865, 1866, 1867, 1868, and 1869 he was managing clerk in the office of the plaintiffs' attorney in this action.

49 That he had charge or supervision of the commencement of suits in that office during the time he was there. That he remembered the fact of the commencement of a batch of suits against Hiram Barney. That he thought that there were from thirty to forty cases; there were a large number of cases. That he remembered distinctly that the summonses were prepared for service before the statute of limitations commenced to run.

The witness was then asked the following question:

"Q. State if you remember whether you made any effort, and if so what effort, to serve defendant Barney with summonses in these cases, and if so when and what?"

To this question the defendant's counsel objected on the ground,

First. That the same was incompetent, immaterial and irrelevant.

Second. On the ground that it was not shown that the witness was a sheriff or other officer.

These objections the referee overruled; to this ruling the defendant by his counsel excepted, which exception was duly noted and allowed.

The witness then answered:

"A. I do remember I caused summonses to be prepared in all those cases. It was some time after the expiration of Mr. Barney's term of office; my recollection is that it was either in 1866 or 1867 when these summonses were prepared. I called at Mr. Barney's office myself

50 for the purpose of serving him with copies of these summonses in the years 1866 and 1867. I called repeatedly. I never found Mr. Barney at his office; I was informed either by some of the clerks in the office or somebody connected with the office, and upon one occasion by Mr. William Allen Butler himself, that Mr. Barney was absent in the Western States, to be absent some considerable length of time whether for weeks or months I can not now recall."

The defendant thereupon, by his counsel, moved to strike out that part of the answer commencing with the words "I was informed" to and including the words "I can not now recall," on the ground that it is not responsive and does not state facts, but it is hearsay.

This motion the referee denied. To this ruling the defendant, by his counsel, excepted; which exception was duly noted and allowed.

The witness then testified that the general run of the business of the office and his duties as managing clerk and the care to serve before the statute began to run were the only circumstances connected with the case that fixed the time when he first tried to serve Mr. Barney. That he might further state that the statute of limitation had been a serious question in the office of plaintiffs' attorney at that time and all along.

Witness was then asked the following question:

Q. Do you remember that the attempt to serve him was before or after the statute began to run?

51 To this question the defendant, by his counsel, objected on the ground that the same was incompetent, irrelevant, and immaterial,

The referee overruled this objection. To this ruling the defendant, by his counsel excepted; which exception was duly noted and allowed.

The witness then answered:

"A. I do remember distinctly that it was before the statute began to run."

The witness on being asked to look at the summons in this action and to state if he knew who finally served Mr. Barney therein, testified: That he found a memorandum endorsed on the summons "Served April 16, 1868," with the letter "D" which was in his handwriting. That from that memorandum he was quite positive he served Mr. Barney at that time.

The witness Darrow on cross-examination testified: That he could not recollect the precise number of times that he attempted to serve Mr. Barney at his office with a summons in this action and other cases in 1866 and 1867; he had made no memoranda of such attempts. That from his recollection he should say that he had made such attempts as many as a half a dozen times in 1866. That he could not swear to the precise number of times; that he had a distinct recollection of going a great many times; that he would not swear it was more than a half a dozen times. That he could not swear to the number of times he had made such attempts in 1867, and could only say he called repeatedly until he was finally served.

52 That in answer to the question as to the number of such attempts he had made in 1868, he must give the same answer; he could not specify the time. That he had no recollection of going to Mr. Barney's house to serve him with a summons in this action and other cases in 1866, 1867, or 1868. That in 1866, 1867 or 1868, he was not a sheriff or other officer of the city or county of New York.

The plaintiffs then offered in evidence the transcript of the record in the case in the Supreme Court of the United States of Hiram Barney, late collector of the port of New York, plaintiff in error, v. Thomas N. Dale and others, defendant in error, being suit No. 138 on the Supreme Court calendar for October term, 1881; and the brief of the Solicitor-General filed in the clerk's office of the Supreme Court October 13, 1881, and the mandate of the Supreme Court of the United States in that case dated October 31, 1882, for the purpose of showing that this exact question as to the statute of limitations had been decided by the circuit court of the United States; that a writ of error was taken to the Supreme Court by this defendant, Barney, and that upon the motion of the Solicitor-General the writ of error was dismissed.

To the admission in evidence of these papers the defendant, by his counsel, objected on the ground,

First. That the same are irrelevant, immaterial, and incompetent.

Second. That the said transcript of such papers, and each of them, are not in a case in which the parties thereto are parties in the action now before the referee.

53 Third. That from said papers it appears that the facts whatever they were in the said case of Barney v. Dale are not set forth therein, and were not before the circuit or Supreme Court or the Solicitor-General, and could not therefore have been in any way passed upon by either of them.

Fourth. That said question as to the statute of limitations was not passed upon in said case of Barney v. Dale by the Supreme Court or the Solicitor-General.

Fifth. That it does not appear from said papers that the facts proven, if any, in said case of Barney v. Dale are the same as the facts in the action now before the referee.

Sixth. That the decision, if any, as shown by said papers is not a matter of evidence but a matter of authority or argument for the consideration of the court.

These objections the referee overruled, and to this ruling the defendant, by his counsel, excepted, which exception was duly noted and allowed.

These papers were then admitted in evidence, and copies thereof are hereto annexed and marked Exhibits A, B, and C.

The plaintiffs, for the purpose of showing the reasons for delay in the prosecution of this action, produced as a witness Almon W. Griswold, who, being duly sworn, testified that this action was commenced April 16, 1868, to recover excess of duties paid on charges and commissions and for excess of fees paid for oaths to entries and stamps on invoices, and orders from one department of the custom-house to another, as stated in
54 the plaintiffs' bill of particulars therein, and was brought to issue January 31, 1870. That on April 16, 1868, when this action was commenced, there were 947 charges and commissions cases pending awaiting adjustment; 154 of these were in verdicts, most of which stood referred to the collector of the port for adjustment. That the second trial of the case of Hutton against Schell in 1868, and the subsequent decisions of the court in the cases of Greenleaf v. Schell (6 Blatch., 223) and Tomes v. Redfield (7 Blatch., 139) seemed to settle certain controverted questions which had a result in the adjustment of charges and commissions cases before the referee, and on December 29, 1870, verdicts were taken in 100 more cases in which suits were commenced in the years 1863, 1864, and 1865, and the verdicts were referred to the collector for adjustment. That shortly after these verdicts were taken, in December, 1870, the Secretary of the Treasury or the Solicitor of the Treasury proposed that charges and commissions cases should be referred to Edwards Pierrepont, esq., who had recently resigned the office of United States attorney for the southern district of New York, and on April 22, 1871, 54 charges and commissions cases were referred to him for adjustment including this action.

On June 21, 1871, seven more cases were referred to him, all of which seven cases were commenced between 1863 and 1868. On April 19, 1872, 135 more cases were referred to him, all of which had been commenced between 1862 and 1865, and on August 13, 1872, 37 more cases were referred to him, all of which were commenced between 1859 and April, 1868.

55 That Mr. Pierrepont having been appointed Attorney-General of the United States in 1874 was unable to complete the adjustment of all the cases referred to him, leaving this and 104 other cases, which were subsequently transferred to John I. Davenport, esq., as referee, on December 19, 1876, on motion of George Bliss, esq., United States attorney.

On December 4, 1874, 86 cases were referred to Mr. Davenport to adjust the amounts due the plaintiffs for duties overpaid on charges and com-

missions only, leaving the other issues undisposed of, to wit, excess of fees for oaths, stamps and for orders. On March 19, 1875, 368 more cases, all commenced prior to June 1865, were referred to Mr. Davenport; that there were also pending in 1868 26 cases without verdicts or orders of reference.

That this action, with the exception of that of Claflin against Barney, was one of the last batch of suits commenced against the collector of customs for duties overpaid on charges and commissions and for fees. That in the spring of 1874 the arrangement, which had been made between the attorneys for the plaintiffs in these charges and commissions cases and the Treasury Department that the cases were to be disposed of by reference, was repudiated. That the arrangement referred to by him was this: That Mr. Pierrepont, as U. S. district attorney in 1869 and 1870, had raised various questions in charges and commissions cases which were argued before the court, including the questions involved in the cases before referred to of Greenleaf v. Schell and Tomes v. Redfield, the de-
56 cision of which, in his judgment, seemed to settle the controverted points; and when he went out of office as United States attorney, the Secretary of the Treasury, through the Solicitor of the Treasury, proposed to the plaintiffs' attorneys in the charges and commissions cases that if they would consent to have the charges and commissions cases referred to Judge Pierrepont as referee, to be adjusted upon the principal and basis of the decisions of the court, the Government would consent to such reference with a view of disposing of all of the remaining charges and commissions cases, and in compliance with that suggestion the cases heretofore specified by witness were referred to Mr. Pierrepont. But that in 1874, after Judge Pierrepont had gone into the Cabinet, a new set of officials in Washington ignored this arrangement, and George Bliss, esq., U. S. attorney, wrote a letter to the Secretary of the Treasury, dated May 11, 1874, a copy of which said letter is hereto annexed and marked Exhibit D.

That on June 4, 1874, Mr. Bliss wrote to the Secretary of the Treasury a letter (a copy of which is hereto annexed and marked Exhibit E) specifying the questions in charges and commissions cases which he desired to have submitted to the Supreme Court of the United States; that this letter of Mr. Bliss on June 10, 1874, was referred by the Secretary of the Treasury to the Attorney General for his opinion; a copy of which is hereto annexed, marked Exhibit F.

That on June 25, 1874, the Attorney-General made his report thereon; a copy of which is hereto annexed and marked Exhibit G.

57 That on July 1, 1874, the Secretary of the Treasury wrote a letter to U. S. Attorney Bliss, proposing a compromise; a copy of which letter is hereto annexed and marked Exhibit H.

That under this compromise the two orders of reference of December 4, 1874, to John I. Davenport were made; that on May 11, 1875, this compromise was repudiated by the Government by letter from the Solicitor of the Treasury to the United States attorney, Bliss; a copy of which letter is hereto annexed and marked Exhibit I.

That on May 21, 1875, a motion was made to vacate all the orders of reference under which cases had been referred to referees for adjustment, which motion was denied as per order of May 24, 1875; a copy of which order and the motion papers upon which the same was based is hereto annexed and marked Exhibits I_1, I_2, I_3.

That from the last-mentioned date of November 6, 1876, one and a half years, only six charges and commissions cases were adjusted and paid. That on December 19, 1876, this case, which had been referred to Judge Pierrepont in 1871 and was unfinished by him, was referred to Mr. Davenport. That from November, 1876, to March, 1877, the Government went on paying, but on March, 1877, they again stopped and no cases were adjusted or paid until 1878 or 1879. That in 1878 or 1879 the Government, through General N. M. Curtis as special agent of the Treasury Department, commenced adjusting and disposing of certain of the so-called charges and commissions cases.

58 That the witness as attorney for the plaintiffs in this case made personal application to General Curtis to adjust and settle this case. That said Curtis proposed that witness as attorney for the plaintiffs in various other cases should first discontinue certain other cases in which the said Curtis claimed that plaintiffs therein could not recover for want of protest. That witness declined this proposition, and said Curtis stated that the representatives of Mr. Douglas' estate were willing to and had consented to the discontinuance of a large number of cases as a condition for the adjustment and payment of other cases which were conceded to be good, or properly protested cases, and that if witness would consent to the same terms, and would discontinue a given number of cases, he would proceed to adjust this action or any other of witnesses cases which he, Curtis, considered good.

That during the four years that General Curtis was stationed here, according to witness' best recollection, he adjusted one case only for any of witnesses' clients, to wit, the case of Marx against Barney.

That this action (of Oelrichs v. Barney) which had been first referred to Pierrepont, in April, 1871, and subsequently to Mr. Davenport in 1876, was transferred to the present referee on August 10, 1882, and has been since pending before him.

That for a year prior to August, 1882, witness, as plaintiffs' attorney, made repeated efforts to get Mr. Davenport to give notice of a
59 hearing in this action, but could not find or communicate with him; and the court finally referred this action to Mr. Deuel.

That the fees issue in this case was first tried in this court in the case of Hutton v. Schell, in April, 1881, and again in November, 1881, in the case of Recknagel v. Schell; and finally in Cochran v. Schell, on May 2, 1882, which latter case was affirmed by the Supreme Court in 1883.

This witness, on cross-examination, then testified that in the cases of Hutton v. Schell, Greenleaf v. Schell, and Tomes v. Redfield, referred to by him, the only question was that concerning duties on charges and commissions. That after issue was joined in this action (Oelrichs v. Barney), on January 31, 1870, he served notice of trial for the October term of this court for 1870, and he believed this action was on the calendar of the court, as it was his custom to cause the cases to go on the calendar whenever he had noticed them for trial.

That on April 22, 1871, this action was referred to Mr. Pierrepont, and stood referred to him until December 19, 1876, when it was transferred to Mr. Davenport as referee. That during the time that this action stood referred to Mr. Pierrepont there were a large number of cases referred to him. That the labor of computation was required to be made by Treasury

instructions by clerks or employees in the custom-house, or persons approved by the Auditor, and all the force that witness was able to obtain or induce the Auditor to assign to work on these cases was employed. That, according to witness' recollection, the adjustment of this action was
60 nearly or quite completed by Mr. Pierrepont before he was appointed Attorney-General, but was not actually finished; and that witness made special efforts to induce him to finish up this action, and three or four other cases similarly situated, nearly completed; but he was unable to induce him to do it.

That there was another reason why no special effort was made to have this action transferred to another referee, and that was that the case of Dale v. Barney, involving the same question of the statute of limitations that is involved in this action, was not finally disposed of until October, 1876, and that there seemed no reason for hurrying or moving this action until it was determined what disposition should be made of the Dale case.

That the cases referred to Mr. Pierrepont were never noticed for hearing by the plaintiffs' attorney; that the referee in those cases gave notice to counsel when he would go on with the cases; that he claimed that right when the order of reference was made to him, without any request of either party. That according to witness' recollection this action and several other cases were noticed by Judge Pierrepont, and this action nearly completed when he (Pierrepont) went to Washington, and witness was unable to induce him to complete it.

That witness would like to state here that there was another reason or cause for delay in adjusting the cases before Mr. Pierrepont, viz: That he went away to Europe in the early summer of 1872 or 1873, and was gone nearly six months, during which time nothing could be done in those cases.

61 That during the time this action stood referred to Mr. Davenport witness did not remember that this action was moved or that any particular effort was made to have the case adjusted until the disposition of the case of Kaupe vs. Barney, which he thought was in 1881, because there were other cases, older issues, ahead of it; and from August, 1881, to August, 1882, he was unable to see or get an answer to any letter addressed to Mr. Davenport, the referee. That he made repeated efforts to see him; that he made repeated requests that he would notice some of the cases referred to him for hearing, but that he could get no reply. That he then applied to Judge Blatchford to know what he could do to have another referee appointed in these cases. That Judge Blatchford suggested he should get from Mr. Davenport a consent that another refer e be appointed in his place. That he applied to Mr. Deuel to procure for him Mr. Davenport's consent for the appointment of another referee, and on August 10, 1882, another referee was appointed in Mr. Davenport's place.

That during the time this action stood referred to Mr. Pierrepont the witness did not make any application to the court to have a referee appointed in his place in this action, or to have the action in any other way disposed of than he had testified. That he did have other cases referred to Mr. Davenport in 1874. That the reason why he did not make any particular move to have these cases that stood referred to Mr. Pierrepont referred to Mr. Davenport, was because personally he was not anxious to have the cases referred to Mr. Davenport.

62 That Mr. Bliss, United States attorney, was anxious that a number of cases should be referred to Mr. Davenport under the stipulation agreed to with the Secretary of the Treasury of the date of July 1, 1874, and the orders heretofore mentioned of December 4, 1874, were made; and then witness did not care to move to take the cases from Mr. Pierrepont for another reason, viz: That it was intimated that Mr. Pierrepont might not remain in the cabinet but a short time, and in case he retired from the cabinet and returned to his practice witness expected to go on with the cases before him.

That during the time this action stood referred to Mr. Davenport he did not remember of making but two applications to the court to have a referee appointed in Mr. Davenport's place in this case, or to have the case in any other way disposed of prior to the application of 1882, or about then. He made one application personally to Judge Blatchford to know how to get rid of Mr. Davenport in this action, and another to Judge Wallace, on which he made the order of August, 1882.

This witness then being asked if he had ever made any attempt to bring to trial the fee issue in this case or any other case prior to the time that issue was tried in 1881 in the case of Hutton v. Schell, testified: That in that very case of Hutton v. Schell he took a whole batch of depositions in Boston upon that issue more than fifteen years ago. That the depostions were returned to the clerk of this court and opened and
63 filed. That when that cause was reached for trial the depositions could not be found, and the trial was postponed. That this was fifteen years ago, he should think. That he should think that the trial of that case was postponed two or three times on that ground. That he did not remember of any other attempt to bring the fee issue to trial other than he had mentioned until it was finally brought to trial in 1880 or 1881. That he did not want to go to trial without the depositions; that he could not take them over again, because two of the most important witnesses had died meanwhile.

Plaintiffs then rested.

Counsel for the defendant then produced, as a witness in his behalf, the defendant, Hiram Barney, who, being sworn, testified that he resided in the city of New York, and had resided there for forty-nine years ten and a half months, with the exception of about ten years, when he resided in Brooklyn, in the State of New York, and that he had always had an office in the city of New York; that he resided in the city of New York in 1861, 1862, 1863, 1864, 1865, 1866, 1867, 1868, 1869, and 1870; that during any of those years he did not reside in any other place except Kingsbridge, which is now in the city of New York; that he never voted elsewhere than in the city of New York, except in the city of Brooklyn, from 1842 to 1852; that he thought in the year 1868 he was in the State of Iowa at the time of the election, and did not vote; that at the other elections occurring in each one of the years from 1861 to 1870, inclusive,
64 he believed he had voted at Kingsbridge, now in the city of New York, and if there was an election occurring at any time other than the November election of 1868 he thought he voted at Kingsbridge; that he could not state exactly how long he was in Iowa at that time, but probably two or three weeks. He was there on a matter of business.

The witness, Barney, on cross-examination, testified:

That he thought he had signed several admissions in other cases like his letter to the referee, dated Nov. 10th, 1882, and put in evidence by plaintiffs in this action—the first one on November 17, 1871, addressed to Edwards Pierrepont, referee; that he did not want to correct any statement made in that admission; that he would state that he had never resided out of the present limits of the city of New York since he came there, May 1, 1833, except when he resided in the adjoining city of Brooklyn from 1842 to 1852; that by stating in his letter of admission that he was absent from the State of New York for several successive periods varying from one day to perhaps forty or fifty days, he meant he was never absent from the city of New York, during the times referred to in that letter, with the intention of remaining away, except for the temporary purposes of pleasure or for business; that he could not recollect so as to be positive whether during his absence from New York at the times specified in that letter, during the years 1866, 1867, and 1868, any one was authorized to admit service upon a summons or capias upon him in custom-house suits, or to answer for him in respect of suits against him in such cases; but he thought there was an arrangement at one time,
65 but how long it continued or whether acted upon he could not say; that the auditor of customs of the law department in the custom-house should receive those papers and forward them to the United States attorney; that whether that arrangement was such as to preclude a service personally on him he could not say, or whether it was so well known that a claimant would be authorized to serve on anybody else he could not tell; that he did not think there was any one in his law office authorized to admit such service.

That his residence during 1866, 1867, and 1868 was at Kingsbridge, on the north side; that he had a summer house there; that in the winter he generally lived at a hotel in the lower part of New York City; that his residence then was where it is now, in the twenty-fourth ward in the city of New York—in the town of Yonkers at first, then Kingsbridge, in the county of Westchester, and, by annexation afterwards, was included in the city of New York; and in 1865, 1866, and 1867 he voted at the poll nearest his residence; that there was but one absence from the State of New York that he thought was over fifty days, and that he thought was less than ninety days—that was in Iowa and Wisconsin.

The witness Barney, on redirect examination, testified: That he had never requested or authorized any person appearing as attorney for him in this action to waive or withdraw the defense of the statute of limitations pleaded by him; that he had not any recollection of any conversation about the statute of limitations until within a few days past with Mr. Greenwood, or with any person representing the district attorney
66 respecting this suit; that he had, on all occasions when he could properly speak on the subject, requested and urged the district attorney to interpose and press the statute of limitations; that he had never requested him to withdraw such a defense; that he had hoped to see the end of these suits; that he had taken a great deal of pains to enforce this view of the subject not only upon the district attorney, but upon the Solicitor of the Treasury and upon the Secretaries of the Treasury, and that he had never known or heard that the defense of the statute of limitations had been waived or withdrawn in this action.

Witness, Barney, on recross-examination, testified: That he had not given any instructions to the district attorney as to the management of this action at any time since he appeared for him therein, unless his general instructions and requests to plead and insist upon the statute of limitations might be considered such, and to obtain a certificate of probable cause. That such instructions and requests had been given from time to time as he had had opportunity in conversation, and that there might have been letters. He could not say as to the latter. That since he retired from the office of collector of customs he had given instructions and requests of the character he had spoken of. He could not say how recently, but he would say within two or three years. That he had continued to give instructions on another point to the district attorney, and had written him within a few days respecting certificate of probable cause.

That with the exception of the questions of statute of limitations
67 and certificate of probable cause he had not troubled the district attorney about any cases pending against him as collector for a return of duties pending in the United States court.

Both parties then rested.

The plaintiffs, by their counsel, then requested the referee to find the following conclusions of fact; and where the same are found by him they are marked "allowed," and where not so found, "not allowed," &c.

Plaintiffs' counsel requests the referee to find as conclusions of fact:

1st. That this action was brought to recover excess of duties paid on charges and commissions; and also fees for oaths, stamps on invoices, and orders from one department of the custom-house to another, and was commenced by service of a summons on April 16th, 1868. Declaration filed, Nov. 4th, 1869, which was followed by defendant's plea, plaintiffs' replication, and defendant's rejoinder, and the cause was finally at issue in February, 1870. Allowed.

Plaintiffs' counsel requests the referee to further find as conclusions of fact in relation to the defense of the statute of limitations interposed by defendant:

1. That in 1873, there were pending in the U. S. circuit court here about thirty-one suits in favor of different plaintiffs against Hiram Barney, late collector of customs, all brought by the same attorney and all involving the same question of the statute of limitations, upon the same state of facts and the same pleadings, and among those thirty-one suits was this of E. A. Oelrichs et al. vs. Hiram Barney. Allowed.

68 2. That in January, 1873, one of these cases, viz: Thomas N. Dale et al., vs. Hiram Barney, was tried before Edwards Pierrepont, esq., to whom said cases had been referred, as referee. Allowed.

3. That on such trial the defense of the statute of limitations was insisted on by George Bliss, esq., the U. S. attorney on behalf of the defendant. Allowed.

4. That the referee in that case, after the evidence was in and arguments closed, decided the question, and made his report in favor of the plaintiffs, to which decision and report the defendant excepted. Allowed.

5. That in fourteen or fifteen other of these cases, tried before said Pierrepont, as referee, about the same time, or shortly after the Dale case was tried, reports in favor of the plaintiffs were made by said referee, the same as in the Dale case, and these reports placed in the hands of George

Bliss, esq., U. S. district attorney and attorney for the defendant, to be retained by him until final decision should be made in the case of Dale vs. Barney. Allowed.

6. That the exceptions in Dale vs. Barney were argued in the U. S. circuit court before Judge Blatchford, who, on April 28, 1875, overruled them and confirmed the decision and report of the referee. But judgment was not entered up until Oct. 5th, 1876. Allowed.

12. That the only apparent issue presented to the Supreme Court by the record of said case, and by the Solicitor-General's brief filed in the case Oct. 13, 1881, was that of the statute of limitations.

69 13. That it appears by the mandate of the court, that said Supreme Court dismissed said writ of error on Oct. 27th, 1881, upon the motion of the Solicitor-General of the U. S. Allowed.

14. That in relation to the question of the statute of limitations, as they appear from the evidence, the facts in this case are the same as in the aforesaid case of Dale vs. Barney and the same as in the case of Hennequin et al. vs. Barney, recently decided by the referee, and the pleadings are indentically the same in form. Allowed.

The plaintiffs request the referee to find as conclusions of law:

1st. That upon the facts and pleadings the defendant has not substantiated his defense of the statute of limitations as pleaded. Allowed. * * * and,

3rd. That plaintiffs are entitled to recover the excess of duty paid on charges and commissions, the principal as computed by and testified to by John V. Williams, amounting to $406.$\frac{85}{100}$, according to a statement prepared by him and put in evidence in this case, with interest thereon to the date of the referee's report. Allowed.

70 Plaintiffs' request to find as to the question of laches under the decision of Redfield et al. vs. Ystalyfera Iron Company.

1st. Plaintiffs filed a note of issue and noticed the cause for trial for October term, 1870 (again for April term, 1871, and again for October term, 1871), and was referred to Edwards Pierrepont, esq., for adjustment as to duties on charges and commissions about April 22, 1871, and subsequently, on Dec. 19, 1876, was referred to John I. Davenport and subsequently, on August 10, 1882, to Joseph M. Deuel.

(Allowed except as to words in parenthesis.)

2nd. That in the issue in this case as to duties on charges and commissions is the youngest of such issues pending in this court, except one, viz, Claflin et al. v. Barney; that at the time this action was commenced, April 17th, 1868, there were nine hundred and forty-six (946) such actions pending, which had been commenced between 1859 and 1868. Allowed.

3rd. The issue in this case of Oelrichs vs. Barney as to duty paid on charges and commissions have been repeatedly tried, and in 154 of the 947 suits, pending when this action was commenced, verdicts had been rendered for the plaintiffs and were then awaiting adjustment and payment. Allowed.

4th. That new decisions touching such cases were had, which are reported in the cases of Hutton vs. Schell, 6 Blatch., 48; Greenleaf vs. same, 6 Blatch., 223; Tomes et al. vs. Redfield, 7 Blatch., 139. Allowed.

71 5th. That on December 29th, 1870, the Government consented to verdicts for excess of duty paid on charges and commissions in

100 cases in which suits had been commenced in the years 1863, '64, '65. Allowed.

6th. That shortly thereafter, pursuant to consent of the Treasury Department and plaintiffs' attorneys, charges and commissions cases were referred to Edwards Pierrepont as follows, viz:

Apl. 27, 1871,	54	cases, including this case, commenced	between	1863–8.
June 21, "	7	"	" "	" "
Apl. 19, 1872,	135	"	" "	1862–5
Aug. 13, "	37	"	" "	1859–68
	233			

Allowed.

7th. That Judge Pierrepont having been appointed Attorney-General of the United States in 1874 was unable to complete the adjustment of all these cases, but left 105 unadjusted, including this case, which were subsequently referred to John I. Davenport, on the motion of George Bliss, esq., U. S. attorney. Allowed.

8th. On December 4th, 1874, 60 cases were referred to Davenport.

On same day 26 other cases, were referred to Davenport to adjust the amount due the plaintiffs on charges and commissions.

And on January 19th, 1875, 368 more cases were referred to Mr. Davenport, which suits had been commenced prior to June 1865;
72 and on Dec. 18, 1876, 105 cases, including this previously referred to Pierrepont. Allowed.

9th. That in consequence of correspondence and negotiations between the U. S. district attorney, George Bliss, the Secretary of the Treasury, and the Attorney-General and solicitor-general of the United States, and claimant's attorneys, touching the charges and commissions cases between May 11th and August 1st, 1874, a compromise or stipulation was entered into settling a basis on which it was agreed that these charges and commissions cases should be adjusted. Allowed.

10th. That on May 11th, 1875, this compromise was repudiated by the Government, and on May 21, 1875, defendant's attorney made a motion to vacate all the orders of reference in these charges and commissions cases. Allowed.

11th. That from May, 1875, to November, 1876, a year and a half, only six charges and commissions cases were adjusted and paid. Allowed.

12th. That from November, 1876, to March, 1877, the Government went on paying, but in March, 1877, they again stopped, and no cases were adjusted or paid till 1878 or 1879. Allowed.

13th. That in 1878 or 1879 the Government, through General N. M. Curtis as special agent of the Treasury, commenced adjusting and disposing of such cases, and the plaintiff's attorney applied to him to adjust and settle this case, but he declined to do it except on condition that plaintiffs' attorney would discontinue certain other actions in which he, Curtis, claimed there could be no recovery for want of a protest. Allowed.

73 14th. That this case, which was first referred to Edwards Pierrepont in April, 1871, and transferred to Davenport in 1876, was transferred to the present referee on August 10, 1882. Allowed.

15th. That for fully a year prior to August, 1882, plaintiffs' attorney made effort to have the referee Davenport notice this case for a hearing, but without success. Allowed.

16th. The issue as to fees in this case was noticed for trial about 1868, and was tried in the case of Hutton vs. Schell in 1881; Recknagel vs. Same; and Cochran vs. Same, in 1881 and '82. Allowed.

17th. The plaintiffs request the referee to find as a conclusion of law that by reason of all the facts in consideration with the decision of the Supreme Court in the Ystalyfera case the plff's are entitled to recover interest upon any amount of principal found due and recoverable in this reference from the date of payment to the date of the report herein. Allowed.

The defendant by his counsel requested the referee to make the following findings; and where the same are found by him they are marked "allowed," and where not found "disallowed."

The defendant in the above-entitled action requests the referee therein to find as conclusions of fact:

1st. That this action was commenced in the superior court of the City of New York, April 16, 1868, to recover (besides other things), alleged excessive duties exacted by the defendant therein as collector of customs at the port of New York from the plaintiffs therein on certain charges and on commissions above the usual rates on or in case of importations made by them from a foreign country, or countries to the United States. Allowed.

74 2d. That on or about May 11th, 1868, this action was duly certioraried into this court. Allowed.

3d. That Nov. 4th, 1869, plaintiffs filed and served a declaration in assumpsit. Allowed.

4th. That the subsequent pleadings in addition to the general issue, are,

(a) Plea. That the supposed several causes of action in said declaration mentioned did not any of them accrue to the plaintiffs at any time within six years next before the commencement of this suit. Allowed.

(b) Replication. That after said several causes had accrued "defendant departed from and resided out of this State for several successive periods amounting in the aggregate to twelve months, and this suit was brought within six years and twelve months after the said several causes of action, and each thereof accrued to the plaintiffs." Allowed.

(c) Rejoinder. That "before the commencement of this suit he, the defendant, did not depart from and reside out of this State for several successive periods, amounting in the aggregate to twelve months, in manner, and form, &c.," concluding "to the country." Allowed.

5th. That at no time after said cause or causes of action had accrued did defendant depart from and reside out of this State for any period or periods whatsoever prior to the commencement of this action. Disallowed.

75 6th. That various items of said alleged excessive duties sought to be recovered in this action by the plaintiffs therein were each more than six years prior to the commencement of this action paid by them to the defendant as said collector on or in case of merchandise mentioned in the following dated entries to the following amounts, and on the following dates, viz:

1861, May 2, John Leslie, paid $32.40, May 2, 1861.
" " 17, Sea Vulture, " .60, " 17, "

1861, Sept. 19, August, paid $0.80, Sept. 19, 1861.
1862, Jan. 29, Elez. de Hart " 3.00, Jan'y 29, 1862.
" March 15, Bremen, " 7.50, March 15, "
Allowed.

7th. That the plaintiffs did not prosecute or attempt to prosecute this action until Februry 8th, 1883. Disallowed.

As conclusions of law:

1st. That the plaintiffs are not entitled to recover in this action any of the said various items (or interest thereon) of the said alleged excessive duties enacted on or in case of importations mentioned in the defendant's 6th request to find as conclusions of fact herein. Disallowed.

2nd. That the plaintiffs are not entitled to recover in this action any interest whatever on any of the various items of the aforesaid alleged excessive duties sought to be recovered by them herein. Disallowed.

76 Afterwards, to-wit, on the 3d day of October, 1884, the referee made his report and filed the same October 8, 1884, of which the following is a copy:

U. S. circuit court, southern district of New York.

E. A. OELRICH ET AL. *vs.* HIRAM BARNEY } N. S. 399.

To the Court:

In obedience to the order of the court of August 10th, 1882, by which this cause was referred to me, to adjust the amount, if any, to which the plaintiffs are entitled, I herewith report that I have been attended by counsel for the respective parties and have taken and considered the testimony and exhibits that have been offered.

I find and report therefrom that, upon the importations specified in plaintiffs' bill of particulars, they are entitled to recover of the defendant the sum of four hundred and six dollars and eighty-five cents, as and for duties on charges and commission upon such importations in excess of the amount lawfully due thereon, and which said amount was illegally

77 exacted by the defendant from, and paid by said plaintiffs under protest, duly made to the defendant in writing; that in addition thereto the plaintiffs are entitled to recover the sum of five hundred and ninety-two dollars and forty-six cents being the amount of interest on the various items constituting the principal sum, from the date of their respective payments to the date of this report, which said principal and interest amount in the aggregate to the sum of nine hundred ninety-nine dollars and thirty-one cents.

A detailed statement of the amounts so paid as aforesaid to the defendant was prepared by an officer of the custom-house and proven before me.

Certain requests as to findings were submitted in writing by counsel, which are returned herewith with my action thereon noted.

All of which is respectfully submitted.

New York, October 3, 1884.

J. M. DEUEL, *Referee.*

To this report of the referee, and to his findings and refusals to find, the defendant by his counsel duly made and filed the following exceptions:

The defendant in the above-entitled action excepts:

1st. To each and every part of the referee's report herein dated Oct. 3d, 1884.

2d. To the refusal of the referee to find as requested by the defendant in his 5th and 7th requests to find as conclusions of fact.

78 3d. To the referee's refusal to find as requested by the defendant in his 1st and 2d requests to find as conclusions of law.

4th. To the referee's findings as requested by the plaintiffs herein in their 1st, 2d, 3d, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, and 14th requests to find as conclusions of fact in relation to the defense of the statute of limitations interposed by defendant.

5th. To the referee's finding as requested by the plaintiffs in their 1st, 2d, and 3d requests to find as conclusions of law as to the defense of the statute of limitation.

6th. To the referee's finding as requested by the plaintiffs in their request to find as conclusions of law as to the recovery of interest.

ELIHU ROOT,
U. S. Atty. & Atty. for Deft.

78½ The precise question involved in the case was presented to the court upon the same pleadings and facts in the case of Hennequin et al. vs. Barney, in which the court on July 27th, 1885, filed the following opinion:

United States circuit court, southern district of New York.

HENNEQUIN ET AL.
vs.
BARNEY.

WALLACE, J.:

Exceptions have been filed by both parties to the findings of the referee to whom this action was referred under an order of the court upon the consent of the parties.

The action was brought to recover alleged excessive duties on "charges andcommissions" exacted by the defendant, as collector of customs at the port of New York, upon importation, made by the plaintiffs between March 21, 1861, and June 30, 1864.

The action was commenced in a State court by the service of a summons on the defendant, April 16, 1868, and was thereupon removed to this court.

The defendant pleaded (1) the general issue, and (2) the statute of limitations. The plaintiffs replied that defendant departed from and resided out of the State for several successive periods, amounting in the aggregate to twelve months, and that the suit was brought within six years and

79 twelve months after the cause of action accrued. Defendant rejoined, denying that defendant departed from and resided out of the State for several successive periods, amounting in the aggregate to twelve months, etc., etc. It appears by the bill of particulars and the evidence

that plaintiffs' cause of action for the recovery of part of the duties in controversy accrued more than six years prior to the commencement of the action, but within six years and twelve months prior. The referee has reported in favor of the plaintiffs as to these duties, and the first question raised by the defendant's exceptions to his report relates to the correctness of this finding. As is conceded by counsel for both parties, the case turns as to this point upon the construction and meaning of the State statutes of limitation enacted in 1851, and being sections 91 and 100 of the Code of Procedure of that year.

Section 91 provided that an action upon a contract, obligation, or liability, express or implied (except a judgment or decree, or a sealed instrument), should be commenced within six years after the same had accrued.

Section 100 provided that if, when the cause of action accrued against any person, he should be out of the State, the action might be commenced after the return of such person into the State; and if, after such cause of action should have accrued, such person should depart from and reside out of the State, the time of his absence should not be deemed or taken as any part of the time limited for the commencement of the action.

80 Under the last section it was well settled by the decisions of the State courts that successive residences out of the State could be accumulated.

The evidence shows that the defendant did depart from and remain out of the State for several successive periods after some of the causes of action for duties accrued, and before the commencement of the suit, which, taken together, amounted to the period of twelve months; that these absences were not a temporary departure, followed by an immediate return, but that he was not absent with any intent to change his domicile, and his domicile was, during these periods, at Kingsbridge, in this State.

The question is whether it was not incumbent upon the plaintiff to show more than this, and whether, within section 100, a person resides out of the State during the period when his domicile is within it.

It was held in Harnden vs. Palmer, 2 ed., Smith, 172, 175, that, although the statute distinguishes between simply departing from and residing out of the State, it was not intended to apply only to cases when a party has lost his legal residence here for all purposes, and that the word "reside," as there used, means a material absence from the State, as contradistinguished from a temporary departure followed by an immediate return.

Whatever view might be reached if the question were an open one in this court, its consideration is foreclosed by the decision of this court, Blatchford, J., in Dale vs. Barney. No opinion was written in that case, but the question was presented, as it is here, upon exceptions to a

81 referee's report, and the referee has carefully considered it and expressed his views at large.

The court apparently adopted the opinion of the referee. The facts, the findings, and the exceptions were precisely those now before the court, and the decision then made, holding that the defendant's absences were to be added to the six years, must be deemed controlling in the present case. It is stated by counsel for the defendant that the case of Kaupe vs. Barney presented the same question and was decided by the same judge in a different way. This is not apparent from the record in that case, which has

been handed up by counsel, and it would seem from the recitals of the order entered in that case that the exceptions were only presented for a pro forma disposition of the case. * * *

Afterwards, to wit, on the 21st day of October, 1885, the plaintiffs, by their counsel, moved the court to overrule the exceptions of the defendant to the referee's report in this case and to confirm the same; and the defendant, by his counsel, moved the court to sustain his exceptions to said report and to overrule the said report in so far as excepted thereto by him.

Whereupon, on the 21st day of October, 1885, the court made the following order, which was duly filed on October 24, 1885:

82 U. S. circuit court, south. dist. of New York.

E. A. OELRICHS ET AL.
vs.
HIRAM BARNEY. } N. S. 399.

This cause, coming on to be heard upon exceptions filed by defendant to the report of J. M. Deuel, esq., the referee, filed herein October 8th, 1884, and after hearing, Thomas Greenwood, esq., representing Elihu Root, esq., U. S. attorney, for the defendant, and A. W. Griswold, esq., attorney for the plaintiffs, and due deliberation had, it is—

Ordered, that the defendant's exceptions to the referee's report be overruled, and the said report be and the same is hereby confirmed.

Dated October 21, 1885.

WM. J. WALLACE.

(Endorsed:) Filed Oct. 24, 1885. A copy. Timothy Griffith, clerk. [L. S.]

83 To this order and decision of the court embodied therein the defendant by his counsel duly excepted so far as the same overruled the defendant's aforesaid exceptions to the rulings of the referee upon the question of the statute of limitations raised by the pleadings and by defendant's requests to the referee to find as to such question; and also to the referee's rulings upon the question of the right of plaintiffs to recover interest, which exception was duly noted and allowed.

And inasmuch as the exceptions, matters, and things aforesaid would not otherwise appear by the record, I have settled, allowed, and signed this bill of exceptions; and

It is ordered that the same be filed as a part of the record herein nunc pro tuncas of October 24, 1885, with like force and effect as if the same had been reduced to writing and filed before the entry of said order.

Witness my hand at the city of New York this 6th day of Sept., 1887.

WM. J. WALLACE.

And afterwards, to wit, on the 18th day of January, 1886, at a stated term of this court, begun and holden on the third Monday of October, 1885, before the honorable Hoyt H. Wheeler, district judge of the United States for the district of Vermont, duly assigned to hold this court, the aforesaid issues so joined as between the parties aforesaid as by the record

more fully appears, came on to be tried by a jury duly empannelled and sworn for that purpose; and the said plaintiffs being represented by Almon W. Griswold, esq., and the said defendant by William Dorsheimer, esq., United States attorney, and Thomas Greenwood, esq., assistant United States attorney, and in the course of the trial said counsel for the
84 defendant did take and allege sundry exceptions to the rulings, instructions, charge, and directions of the court and directions to the jury as then and there prayed for by them, which exceptions are hereinafter severally set forth.

To maintain the said issues upon their part the plaintiffs produced as a witness in their behalf I. Augustus Stanwood, who, being duly sworn, testified that he was a clerk in the auditor's department of the custom-house in the city of New York; that he was a refund clerk in the auditor's division of the said custom-house and had been since 1878. That during the past two years he had made adjustment of excess or returns of fees for oaths, stamps, and orders. That he could not tell how many such adjustments he had made since the receipt by the collector of the letter from the Secretary of the Treasury dated February 16, 1885, but perhaps fifty or seventy-five cases, possibly more. That the basis on which he had adjusted these cases was that of a fee of twenty cents for each oath on an entry of each importation made by the plaintiffs; a fee of twenty cents for each stamp on each invoice, and in the case of consumption entries also a fee of twenty cents for each delivery order, there being accounted on such entries one order for each invoice, but for warehouse entries instructions were to allow where there was one invoice one order, where there are more than one invoice half as many orders as there are invoices. That is the basis upon which those cases have been made up.

The plaintiffs, by their counsel, then offered in evidence a letter from the Secretary of the Treasury to the collector of customs, dated February 16, 1885.

85 To the admission in evidence of this letter the defendant, by his counsel objected, on the ground that the same was incompetent, irrelevant, and immaterial.

This objection the court overruled; to this ruling the defendant, by his counsel, excepted which exception was duly noted and allowed.

This letter was thereupon admitted in evidence and is hereto annexed and marked Exhibit K.

Plaintiffs, by their counsel, then offered in evidence a letter from the Secretary of the Treasury addressed to Almon W. Griswold, dated February 16, 1865.

To its admission in evidence the defendant, by his counsel, made the same objection as just stated.

This objection the court overruled; to this ruling the defendant, by his counsel, excepted, which exception was duly noted and allowed.

This letter was then admitted in evidence and is hereto annexed and marked Exhibit L.

86 The witness Stanwood was asked by counsel for plaintiffs the following question:

Q. Have you adjusted this case on fees for oaths, stamps and orders upon the basis prescribed by the Secretary of the Treasury in his his letter of February 16, 1885?

To this question the defendant by his counsel objected, on the ground that the same was incompetent, irrelevant, and immaterial.

This objection the court overruled, to this ruling the defendant, by his counsel, excepted; which exception was duly noted and allowed.

The witness then answered.

"A. I have made an adjustment of such fees in this case; that is, in the entries embraced in the bill of particulars without the consideration of the question of the statute of limitations, and I have found that amount of fees to be——

The Court. He wanted to know if you had made the adjustment in accordance with that letter.

A. Yes, sir; I have.

The counsel for the plaintiff then asked the witness the following question:

Q. Now will you be kind enough to state to the court and jury the amount of principal of such fees?

To this question the defendant by his counsel objected, upon the ground,

First. That the same was incompetent, immaterial, and irrelevant; and

87 Second. That the plaintiffs have not proven that any fees have been paid by them to the defendant as collector.

This objection the court overruled; to this ruling the defendant, by his counsel, excepted, which exception was duly noted and allowed.

"A. I find it to be $113.60."

"Q. What is the amount of interest on that sum up to the present time?"

To this question the defendant, by his counsel, objected on the ground that the same was incompetent, irrelevant, and immaterial.

This objection the court overruled; to this ruling the defendant, by his counsel, excepted, which exception was duly noted and allowed.

"A. Seven per cent. interest on the principal from the dates of payment to December 31, 1879, $134.14; six per cent. interest from that time till January 18, 1886, I haven't computed; I did not know it was required, but it was about $41.00; I will make this computation exactly."

Plaintiffs' counsel then said, "If your honor will allow him, witness, to state that hereafter, I will turn the witness over to the defendant."

The defendant's counsel then said, "I do not know that I have got anything to ask this witness. There has been no proof that there has been anything paid by these plaintiffs as the case now stands."

88 Plaintiffs' counsel then offered in evidence a letter from the United States attorney to Almon W. Griswold, dated November 11, 1884.

To the admission in evidence of this letter the defendant, by his counsel, objected, on the ground that the same was irrelevant, incompotent, and immaterial.

This objection the court overruled. To this ruling the defendant, by his counsel, objected, which exception was duly noted and allowed.

The letter was then admitted in evidence, a copy of which is hereto annexed and marked Exhibit M.

Plaintiffs, by their counsel, offered in evidence a letter from Almon W. Griswold to United States attorney, dated November 12, 1884.

To the admission in evidence of this letter the defendant, by his counsel, objected, on the ground that the same was irrelevant, incomptent, and immaterial.

This objection the court overruled. To this ruling the defendant, by his counsel, excepted, which exception was duly noted and allowed.

The letter was then admitted in evidence, a copy of which is hereto annexed, marked Exhibit N.

The plaintiffs, by their counsel, then offered in evidence a letter from the Secretary of the Treasury to the collector of customs, dated April 12, 1883.

To the admission in evidence of this letter the defendant, by his counsel, made the same objection as last stated.

This objection the court overruled. To this ruling the defendant, by his counsel, excepted, which exception was duly noted and allowed.

89 This letter was then admitted in evidence, a copy of which is hereto annexed and marked Exhibit O.

Plaintiffs, by their counsel, then offered in evidence a letter from Almon W. Griswold to the United States attorney, dated January 3, 1885.

To the admission in evidence of this letter the defendant, by his counsel, made the same objection as last stated.

This objection the court overruled; to this ruling the defendant, by his counsel excepted, which exception was duly noted and allowed.

This letter was then admitted in evidence, a copy of which is hereto annexed and marked Exhibit P.

Plaintiffs, by their counsel, then offered in evidence a letter from the United States attorney to Almon W. Griswold, dated January 6, 1885.

To the admission in evidence of this letter the defendant, by his counsel, made the same objection as last stated.

This objection the court overruled; to this ruling the defendant excepted, which exception was duly noted and allowed.

This letter was then admitted in evidence, and is hereto annexed and marked Exhibit Q.

Plaintiffs, by their counsel, then offered in evidence a letter from Almon W. Griswold to the United States attorney, dated January 17, 1885.

90 To the admission in evidence of this letter the defendent by his counsel made the same objection as last stated.

This objection the court overruled; to this ruling the defendant, by his counsel, excepted, which exception was duly noted and allowed. This letter was then admitted in evidence, a copy of which is hereto annexed and marked Exhibit R.

The plaintiff, by their counsel, then offered in evidence a letter from Almon W. Griswold to the United States attorney, dated January 29, 1885.

To the admission in evidence of this letter the defendant, by his counsel, made the same objection as last stated.

This objection the court overruled; to this ruling the defendant, by his counsel, excepted, which exception was duly noted and allowed.

This letter was then admitted in evidence, a copy of which which is hereto annexed and marked Exhibit S.

Plaintiffs, by their counsel, then offered in evidence a letter from the

United States attorney to Almon W. Griswold, dated January 23d, 1885.

To the admission in evidence of this letter the defendant, by his counsel, made the same objection as last stated.

This objection the court overruled; and to this ruling the defendant, by his counsel excepted, which exception was duly noted and allowed.

The letter was then admitted in evidence, a copy of which is hereto annexed and marked Exhibit T.

The plaintiffs, by their counsel, then offered in evidence a letter from Almon W. Griswold to the United States attorney, dated January 24, 1885.

91 To the admission in evidence of this letter the defendant, by his counsel, made the same objection as last stated.

This objection the court overruled, to this ruling the defendant, by his counsel excepted, which exception was duly noted and allowed.

This letter was then admitted in evidence; a copy of which is hereto annexed and marked Exhibit U.

The plaintiffs then recalled as a witness in their behalf, I. Augustus Stanwood, who was asked the following question:

"Q. I will ask you to repeat what you have heretofore testified to as to the amount of principal in this case for fees?"

To this question the defendant, by his counsel, objected, on the ground that the same was incompetent, irrelevant, and immaterial.

This objection the court overruled; to this ruling the defendant, by his counsel, excepted; which exception was duly noted and allowed.

"A. I found the principal to be $113.60; seven per cent. interest $134.14; six per cent. interest to January 18, 1886, $41.38, making $289.12."

Witness further testified that the interest on the amount found by the referee in his aforesaid report on $999.31 from October 3, 1884, to the present time was $77.43, making with said principal sum $1,076.74.

92 The plaintiffs then offered in evidence a letter from Almon W. Griswold to the Secretary of the Treasury, dated February 11, 1885.

To the admissionin evidence of this letter the defendant, by his counsel, objected, on the ground that the same was incompetent, immaterial, and irrelevant.

This objection the court overruled; to this ruling the defendant, by his counsel, excepted; which exception was duly noted and allowed.

This letter was then admitted in evidence; a copy of which is hereto annexed and marked Exhibit V.

The plaintiffs then rested.

The defendant, by his counsel, moved the court to direct the jury to find a verdict in his favor as to the plaintiffs' claim for fees,

First. On the ground that they had not proved that these fees were paid by them to the defendant.

Second. That they have not proved facts sufficient to entitle them to recover.

This motion the court denied, and to this ruling the defendant, by his counsel, excepted; which exception was duly noted and allowed.

The defendant, by his counsel, then moved the court to direct the jury to find a verdict in his favor as to the issue of charges and commissions, upon the ground that the plaintiffs had not proved facts sufficient to entitle them to recover.

93 This motion the court denied, and to this ruling the defendant, by his counsel, excepted; which exception was duly noted and allowed.

The defendant then produced as a witness in his behalf I. Augustus Stanwood, who testified: That he had adjusted certain amount of principal for fees as claimed by the plaintiffs, as already testified to by him; that he never saw any of those fees paid by the plaintiffs, to anybody; that he did not know whether any of them had ever been paid, and that if they had been paid he did not know when they were paid.

This witness on cross-examination testified: That he had been a referee appointed by the court to adjust two fee cases some years ago; that he thought these cases were the Hutton and the Recknagel and Cochran cases; that there was a good deal of evidence in the Cochran cases tending to show the payment of fees in that case; that he remembered some of them; that he had no doubt that the invoices and entries themselves in that case showed the amount of fees paid for oaths and for stamps on invoices.

Both sides having rested the defendant by his counsel moved the court to direct the jury to find a verdict in his favor as to the plaintiffs' claim for fees, on the ground—

First. That they had not proven that these fees had been paid.

Second. On the ground that they had not proven facts sufficient to entitle them to recover.

94 This motion the court denied, and to this ruling the defendant, by his counsel, excepted; which exception was duly noted and allowed.

The defendant, by his counsel, then moved the court to direct the jury to find a verdict in his favor as to the issue of charges and commissions, on the ground that the plaintiffs had not proven facts sufficient to entitle them to recover.

This motion the court denied, and to this ruling the defendant, by his counsel, excepted; which exception was duly noted and allowed.

The Court. I think the Government is bound by the arrangement which it made with the plaintiffs' attorney. I think that this matter should be adjusted, and that Mr. Stanwood has adjusted it according to that arrangement and the plaintiffs are entitled to a verdict accordingly. So, gentlemen, you may render a verdict for the plaintiffs for $289.12 for fees, and $1,076.74 for excess of duties paid on charges and commissions on the report of the referee.

To the direction of the court to the jury to find a verdict for the plaintiffs as to charges and commissions, the defendant, by his counsel, excepted; which exception was duly noted and allowed.

To the direction of the court to the jury to find a verdict for the plaintiffs as to fees, the defendant, by his counsel, excepted; which exception was duly noted and allowed.

To the direction of the court to the jury in so far as it directed the jury to find that the plaintiffs were entitled to recover any interest whatever, the defendant, by his counsel, excepted; which exception was duly noted and allowed.

95 The jury thereupon found a verdict for the plaintiffs under the direction of the court. And inasmuch as the exceptions, matters, and things aforesaid would not otherwise appear by the record, I have settled, allowed, and signed this bill of exceptions, and

It is ordered that the same be filed as a part of the record herein nunc pro tunc as of Jany. 18, 1886, with like force and effect as if the same had been reduced to writing and filed before the cause was given to the jury.

Witness my hand, at the city of New York, this 18th day of August, 1887.

HOYT H. WHEELER.

96 PLAINTIFFS' EXHIBIT, A.

Supreme Court of the United States No. 138. Hiram Barney, late collector of the port of New York, plaintiff in error, vs. Thomas N. Dale, George Richmond, John R. Harris, and Joseph H. Brown. In error to the circuit court of the United States for the southern district of New York.

97 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court before you, between Thomas N. Dale, George Richmond, John R. Harris, & Joseph H. Brown, plaintiffs, and Hiram Barney, defendant, a manifest error hath happened to the great damage of the said Hiram Barney as by his complaint appears: We being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October, eighteen hundred and seventy-eight, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further be done thereon to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the said Supreme Court, the 31st day of July, in the year of our Lord one thousand eight hundred and seventy-eight.

[SEAL.] JOHN I. DAVENPORT,
Clerk.

The foregoing writ is hereby allowed.

SAM'L BLATCHFORD.

(Indorsed:) A. 171. U. S. Supreme Court. Hiram Barney, plaintiff in error, against Thomas N. Dale, George Richmond, John R. Harris, & Joseph H. Brown, defendants in error. Writ of error. Stewart L. Woodford, att'y for pl'ff in error. U. S. circuit court. Filed Aug. 1, 1878. John I. Davenport, clerk.

I hereby admit of a copy of the within.

ALMON W. GRISWOLD,
Atty. for Def'ts in Error.

AUG. 1, '78.

UNITED STATES OF AMERICA,
Southern district of New York, ss:

I, John I. Davenport, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the foregoing pages, numbered from 3 to 51, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Hiram Barney, plaintiff in error, against Thomas N. Dale, George Richmond, John R. Harris, and Joseph H. Brown, defendants in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of said court to be hereunto affixed at the city of New York, in the southern district of New York, in the second circuit, this ninth day of October, in the year of our Lord one thousand eight hundred and seventy-eight, and of the Independence of the said United States the one hundred and third.

[SEAL.] JOHN I. DAVENPORT,
Clerk.

98 *Summons for a money demand on contract.*

N. Y. superior court.

THOMAS N. DALE, GEORGE RICHMOND, JOHN R. HARRIS, & JOSEPH H. BROWN
against
HIRAM BARNEY. } Com not ser.

To the above-named defendant:

You are hereby summoned and required to answer the complaint in this action, which will be filed in the office of the clerk of the superior court of New York City, at the city hall in said city, and to serve a copy of your answer to the said complaint on the subscriber, at his office, No. 20 Nassau st., in said city, within twenty days after the service of this summons on you, exclusive of the day of such service; and if you fail to answer the said complaint within the time aforesaid, the plaintiffs in this action will take judgment against you for the sum of two thousand dollars, with interest from the eighth day of April, one thousand eight hundred and sixty-one, besides the costs of this action.

Dated New York, Jany. 2nd, 1868.

A. W. GRISWOLD,
Plaintiffs' Attorney, 20 Nassau st.

(Endorsed:) New York superior court. Thos. N. Dale et al. against Hiram Barney. Summons. A. W. Griswold, pl'ffs' att'y, 20 Nassau st.

NEW YORK, , 1868.

Due service of a copy of the within is hereby acknowledged.
Served Dft Barney Feb'y 3, 1868.

A. H.

Notice of appearance.

New York superior court.

HIRAM BARNEY
ads.
THOMAS N. DALE & AL.

SIR: You will please take notice that I am retained by and appear as attorney for Hiram Barney, the defendant in this action, and demand service of a bill of particulars of the plaintiffs' claim herein, and a copy of their complaint, upon me at my office in the U. S. court buildings, Nos. 41 and 43 Chambers street, in the city of New York.

Yours, &c.,

SAMUEL G. COURTNEY,
Attorney for Defendant.

To A. W. GRISWOLD, ESQ.,
Plaintiffs' Attorney.

(Endorsed:) Superior court. Hiram Barney ads. T. N. Dale & al. Notice of appearance. S. G. Courtney, defendant's attorney.

Due service of a notice, of which the within is a copy, is hereby admitted.

Dated New York, , 186 .

A. W. GRISWOLD.

Rec'd Feb'y 15, '68.

A. H.

99 The President of the United States of America to the judges of the superior court of the city of New York, greeting:

We, for certain reasons, being desirous that our circuit court of the United States for the southern district of New York, in the second circuit, shall be certified of a certain cause commenced before you against Hiram Barney, defendant, by Thomas N. Dale & al., plaintiffs, do therefore command you that the record and proceedings in the said cause, you distinctly and openly send to the said circuit court, at the city of New York, on the 24th day of February, 1868, as fully and amply as the same are remaining before you by whatever names the said parties may be called therein, together with this writ, that our said court may cause to be further done thereupon what of right ought to be done.

Witness Salmon P. Chase, esquire, Chief Justice of the Supreme Court of the United States, the 17th day of February, in the year one thousand eight hundred and sixty-eight.

[SEAL.] KENNETH G. WHITE, *Clerk.*

SAMUEL G. COURTNEY,
Defendant's Attorney.

(Endorsed:) U. S. circuit court. Hiram Barney, ads. T. N. Dale & al. Copy certiorari. S. G. Courtney, defendant's attorney.

SIR: Take notice that the within is a copy of a certiorari this day issued out of the circuit court of the United States for the southern district of New York.

New York, Feb. 17, 1868.

Yours, &c.,

S. G. COURTNEY,
Defendant's Attorney.

Due service of a copy of the within and of the above notice is hereby admitted.

New York, , 186 .

A. W. GRISWOLD,
Plaintiffs' Attorney.

Rec'd Feb'y 17, '68.

A. H.

U. S. circuit court.

THOMAS N. DALE ET AL.
vs.
HIRAM BARNEY.

SOUTHERN DISTRICT OF NEW YORK, *ss.:*

The above-named plaintiffs come here into court, and by A. W. Griswold, their attorney, suggest and give the court now here to understand and be informed that heretofore, to wit, on the 3d day of February, 1868, last past, an action was commenced in the superior court of the city of New York, according to the laws of the State of New York, and the rules and practice of said court in such case made and provided, in favor and in the name of the said plaintiffs against the defendant herein, upon and for the same cause of action hereinafter set forth, and the summons therein was filed in the clerk's office of the said superior court; that the defendant afterwards, by his attorney, duly appeared in said action and such proceedings were thereupon had that afterwards, and on the 24th day
100 of February, in the year of our Lord one thousand eight hundred and sixty-eight, the said action was in due form of law removed by writ of certiorari for further prosecution and trial into this court, according to the act of Congress in such case made and provided; and the clerk of the said superior court did thereupon return the said writ with the summons aforesaid, and did file the same in this court, according to the course and practice of this court, which allegations and suggestions the defendant does not deny, but admits the same to be true.

Wherefore, let the further proceedings and trial in this action against the defendant be continued in this court.

And the plaintiffs accordingly, by their attorney aforesaid, complain of the defendant herein in a plea of trespass on the case.

For that whereas the said defendant, on the 8th day of April, one thousand eight hundred and sixty-one, at the city of New York, in the southern district aforesaid, was indebted to the said plaintiffs in the sum of two thousand dollars, lawful money of the United States of America, for money before that time lent and advanced by the said plaintiffs to the said de-

fendant, and at the special instance and request of said defendant. And for other money by the said plaintiffs before that time paid, laid out, and expended for the said defendant, and at the request of the said defendant. And for other money by the said defendant before that time had and received to and for the use of the said plaintiffs. And being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money in this count mentioned, when the defendant should be thereunto afterwards requested.

And whereas also the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, accounted together with the said plaintiff of and concerning divers other sums of money before that time due and owing from the said defendant to the said plaintiffs, and then and there being in arrear and unpaid, and upon such accounting the said defendant then and there was found to be in arrear, and indebted to the said plaintiffs in the further sum of two thousand dollars of lawful money, as aforesaid. And being so found in arrear and indebted to the said plaintiff, the said defendant, in the consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money last mentioned, when the said defendant should be thereunto afterwards requested. Nevertheless, the said defendant (although often requested, &c.) has not yet paid the said several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiffs, but to pay the same or any part thereof to the said plaintiffs the said defendant has hitherto wholly refused, and still does refuse, to the damage of the said plaintiffs two thousand dollars, and thereof the plaintiffs bring suit, &c.

A. W. GRISWOLD,
Attorney for Plaintiffs.

(Endorsed:) U. S. circuit court. T. N. Dale et al. vs. Hiram Barney. Declaration. A. W. Griswold, pl'ffs' att'y.

Please take notice, that on filing a declaration in this cause, with a copy whereof you are hereby served, a rule has been entered in the book of common rules, kept in the office of the clerk of this court
101 at the city of New York, requiring the within-named defendant to plead to said declaration in twenty days after service of a copy thereof and notice of said rule or judgment on his attorney.

New York, March 11th, 1868.

A. W. GRISWOLD,
Pl'ffs' Att'y.

Service of a copy of within and of the above notice is admitted.
N. Y., March 14, 1868.

SAM'L G. COURTNEY,
D'f'ts Att'y.

Plea.

United States circuit court, southern district of New York.

HIRAM BARNEY
ads.
THOMAS N. DALE & AL.

And the said defendant, Hiram Barney, by Samuel G. Courtney, his attorney, comes and defends the wrong and injury, when, &c., and says that he did not undertake and promise in manner and form as the said plaintiffs in this suit have above thereof declared against the said defendant. And for a further and other plea in this behalf, the said defendant says that the said supposed causes of action did not, nor did any of them, accrue to the said plaintiffs at any time within six years next before the commencement of this suit, and this the said defendant is ready to verify, and of these he puts himself upon the country, and the said plaintiffs do the like, &c.

SAMUEL G. COURTNEY,
Defendant's Attorney.

To A. W. GRISWOLD, Esq.,
Plaintiffs' Attorney.

(Endorsed:) U. S. circuit court. Hiram Barney ads. Thomas N. Dale & al. Plea. Samuel G. Courtney, attorney for defendant.

You will please take notice that the plea of the defendant in the above cause, of which the within is a copy, was this day filed in the office of the clerk of the U. S. circuit court for the southern district of New York.

New York, March 24th, 1868.

Yours, &c.,
S. G. COURTNEY,
Defendant's Attorney.

To , Esq.,
Plaintiffs' Attorney.

Reply.

U. S. circuit court, southern district of New York.

THOS. N. DALE ET AL.
vs.
HIRAM BARNEY.

And the said plaintiff", as to the plea of the said defendant by him first above pleaded, and whereof he hath put himself upon the country, do the like.

And the said plaintiff", as to the plea of the said defendant by him lastly above pleaded, say that the said plaintiff", by reason of anything
102 by the said defendant in that plea alleged, ought not to be barred from having and maintaining their aforesaid action thereof against the said defendant, because they say that after the said several causes of action in the said complaint mentioned had accrued so the said plaintiff", the said defendant departed from and resided out of this State for several

successive periods, amounting in the aggregate to twelve months, and this suit was brought within six years and twelve months after the said several causes of action and each and every thereof accrued to these plaintiffs.

And this the said plaintiffs are ready to verify, wherefore they pray judgment and their damages by them sustained to be adjusted, &c.

A. W. GRISWOLD,
Plaintiffs' Attorney.

(Endorsed): United States circuit court. Thos. N. Dale et al. vs. Hiram Barney. Reply. A. W. Griswold, plaintiffs' attorney.

You will please take notice that the reply of the plaintiffs to the plea of the defendant in the above cause, of which the within is a copy, was this day filed in the office of the clerk of the United States circuit court for the southern district of New York.

New York, April 29, 1868.

Yours, &c.,

A. W. GRISWOLD,
Plaintiffs' Attorney.

To S. G. COURTNEY,
Defendant's Attorney.

Rejoinder.

U. S. circuit court, southern district of New York.

THOMAS N. DALE & AL.
vs.
HIRAM BARNEY.

And the said defendant, as to the said replication of the said plaintiffs to the said second plea of the said defendant, says that the said plaintiffs ought not by reason of anything by them in that replication alleged to have or maintain their aforesaid action thereof against him, the said defendant, because he says that after the said several supposed causes of action in the said complaint mentioned had accrued to the said plaintiffs, and before the commencement of this suit, he, the said defendant, did not depart from and reside out of this State for several successive periods, amounting in the aggregate to twelve months, in manner and form as the said plaintiffs have above in their said replication in that behalf alleged. And of this he, the said defendant, puts himself upon the country, and the said plaintiffs do the like.

EDWARDS PIERREPONT,
Defendant's Attorney.

(Endorsed:) U. S. circuit court, sourthern district of New York. Thomas N. Dale & al. vs. Hiram Barney. Rejoinder. Edwards Pierrepont, defendant's att'y.

To A. W. GRISWOLD, Esq.,
Pl'ffs' Att'y:

You will please take notice that the rejoinder of the defendant in the

103 above cause, of which the within is a copy, was this day filed in the office of the clerk of the U. S. circuit court for the southern district of New York.

New York, Jan. 31, 1870.

Yours, &c.,

EDWARDS PIERREPONT,
Deft's Atty.

And the said parties having stipulated in writing to refer the issues to the Hon. Edwards Pierrepont, as referee, and said referee having made his report, filed December 8, 1874, in the office of the clerk of this court, by which he found in favor of the plaintiffs for the sum of nine hundred and thirty-nine & $\frac{46}{100}$ dollars in gold & silver coin, paid as and for duties as of January 27th, 1873, and the defendant having duly excepted to said report, and such exceptions coming on to be heard before Hon. Samuel Blatchford, district judge, he, on the 28th day of April, 1875, did overrule such exceptions and confirm said referee's report, and directed judgment in favor of the plaintiffs and against the defendant for the above amount, as reported by the referee.

Therefore it is considered that the said plaintiffs recover against said

939 46
362 70
$1,602 16

defendant their damages aforesaid, amounting to nine hundred and thirty-nine & $\frac{46}{100}$ dollars in gold and silver coin, and their costs and charges now here adjudged, amounting to three hundred and sixty-two & $\frac{70}{100}$ dollars, amounting together to the sum of thirteen hundred and two & $\frac{16}{100}$ dollars.

Judgment signed this 5th day of Oct., 1876.

J. M. DEUL,
Dep. Clerk.

(Endorsed:) U. S. circuit court, southern district of New York, Thomas N. Dale et al. vs. Hiram Barney. Judgment roll. A. W. Griswold, pl'ffs att'y, 120 Broadway, N. Y. Filed Oct. 5, 1876.

U. S. circuit court, southern district of New York.

At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court rooms, in the city of New York, on Saturday the 22d day of April, in the year of our Lord one thousand eight hundred and seventy-one.

Present the honorable L. B. Woodruff, circuit judge.

THOS. N. DALE ET AL.
vs.
HIRAM BARNEY,
and 54 other cases.

U. S. circuit court, southern district of New York.

It is hereby stipulated and agreed that the order hereto annexed be entered by and with the consent and direction of the court in each of the

several above entitled causes—fifty-four in all—and that upon the entry of such order the said several causes stand referred to Hon. Edwards Pierrepont, for the purposes and in the manner specified in said order.

April 22d, 1871.

ALMON W. GRISWOLD, *Pl'ffs Att'y,*
Att'y for the several Plaintiffs.
NOAH DAVIS,
Attorney for the several Defendants.

104 On reading and filing the stipulation on behalf of the respective parties to the above entitled actions now pending in this court to recover duties alleged to have been illegally exacted upon charges and commissions, it appearing to the court that the assessment of the damages in each of the said several causes will require the examination of long accounts and of numerous invoices, entries, and other documents and papers and the taking of the testimony of various witnesses touching the same:

Now, on motion of A. W. Griswold, esq., of counsel for the said several plaintiffs, Mr. Noah Davis, counsel for said several defendants, appearing and consenting thereto, it is ordered by the said court now here that the said several causes be, and they are hereby, referred to Edwards Pierrepont, esq., as sole referee to take proofs of and ascertain the claim of the plaintiff or plaintiffs in each of the said several causes, with interest, for excess of duties upon such charges and commissions which may be found to have been illegally exacted from plaintiffs and paid under protest to defendants and not barred by the statute of limitations, whenever the same has been pleaded, upon importations at the port of New York, specified in the several bills of particulars served in said several causes and now on file in said causes. The said referee shall proceed to determine and adjust the claims of the said several plaintiffs in accordance with the rules and decisions of this court in similar cases, so far as the same shall be found applicable to the said causes herein above named.

And it is further ordered, that said referee state and report the amounts ascertained by him on said several commissions and charges separately and the facts found by him in respect thereto, and in respect to the protests touching the same. That he gave notice to the attorney of the respective parties of the time and place of hearing therein, and that either party may, on the hearing before said referee, raise objections and exceptions, and the referee shall decide thereon, and either party may bring such objections and exception to a hearing before the court after the report of such shall be filed, and for that purpose may require the referee to report the evidence or testimony taken in the case upon which the objection or exception arises in such manner as the court shall direct, and copies of the protest filed therein respectively. That said referee shall report on such cases with all convenient dispatch, and on the coming in of such report and the decision of such exceptions as may be taken thereto by either party, either party shall be at liberty to move for judgment or verdict for the amount as to the court shall seem meet.

And it is further ordered that the compensation of said referee shall be determined by the court, after the coming in of his said reports, at such amount as shall appear to such court to be just and proper.

Enter.

L. B. W.

(Endorsed:) U. S. circuit court, C. F. Van Blankensteyn & oth's vs. Augustus Schell. Order of reference to Edwards Pierrepont. 54 other cases same order. A. W. Griswold, pl'ffs att'y. Filed April 22, 1871.

Circuit court of the United States for the southern district of New York.

THOS. N. DALE ET AL.
vs.
HIRAM BARNEY.

In pursuance of an order made in the above entitled cause on
105 the 22nd day of April, in the year one thousand eight hundred and seventy-one, by which, among other things, it was referred to the undersigned to adjust the amount, if anything, for which the plaintiffs are entitled to a verdict in this cause, and to report thereon to this court with all convenient speed:

Now I, Edwards Pierrepont, to whom the matter was referred, do report that I have been attended by the counsel for the respective parties, and have taken and examined the testimony offered in support of the plaintiffs' claim, and do find that upon the importations specified in the plaintiffs' bill of particulars in the case the said plaintiffs paid to the defendant, as collector of the port of New York, as and for duties on charges and commissions on said importations in excess of the amount required by law, the sum of five hundred and sixty & $\frac{35}{100}$ dollars in gold and silver coin, or in Treasury notes issued under the authority of the United States, and that said duties were illegally exacted by the defendant from and paid by said plaintiffs to said defendant under protest, duly made by the said plaintiffs in writing; and I do find that the plaintiffs are entitled to a verdict of said sum of five hundred and sixty & $\frac{35}{100}$ dollars, as and for duties, and to interest on said sum from the date of its payment to the date of this my report, amounting to three hundred and seventy-nine & $\frac{11}{100}$ dollars, amounting, in the aggregate, to the sum of nine hundred and thirty-nine & $\frac{46}{100}$ dollars, and that a statement of the said amounts so paid by the said plaintiffs to the said defendants as and for duties on charges, and as and for duties on commissions, together with interest due thereon, forming part of this my report, is hereto annexed.

All of which is respectfully submitted.

EDWARDS PIERREPONT,
Dated New York, January 27th, 1873. *Referee.*

560. 35
379. 11

$939. 46

United States circuit court.

THOS. N. DALE ET AL.
vs.
HIRAM BARNEY.

Statement of excess of duty exacted on commissions added to invoice value of merchandise, above the usual rates, and charges exceeding those liable to duty under Treasury instructions dated May 21st, 1863, and the decisions of the courts. Imported by T. N. Dale & Co. Issued pursuant to report of Edwards Pierrepont, esq., referee, dated January 27th, 1873.

Date of entry.	Name of vessel.	Where from.	Whence imported.	Exacted on—	Dutiable value.	Rate.	Duty.	Amount.	Date of payment.	Time. Years.	Time. Days.	Interest to October 20th, 1872.
May 6	C. of Baltimore..	L'pool	P. Ch. &c.	Ch.	2	30	.....	.60	May 6	11	167	.81
18	Arago	Havre	.....	....	6	30	.....	1.80	June 3	11	139	1.56
June 3	New York.....	Bremen....	.....	....	6	15	.....	.90	" 3	11	139	.81
" 7	C. of Washington	L'pool	.....	....	2	30	.60	.....	.....	.....	.....	.....
				C.	1	30	.30	.90	" 7	11	135	.80
July 2	Etna.....	"	.....	Ch.	2	30	.60	.....	.....	.....	.....	.....
				C.	3	30	.90	1.50	July 2	11	110	1.58
June 11	Fulton.....	Havre	.....	Ch.	4	30	.....	1.20	" 7	11	105	.79
106]1861.									1861.			
July 11	Edinburg	L'pool	.....	....	1	30	.30	.....	.....	.....	.....	.....
				C.	4	30	1.20	1.50	July 11	11	101	1.58
" 10	Arago	Havre	.....	Ch.	1	30	.....	30	Aug. 16	11	65	.....
" 5	Persia	L'pool	.....	....	3	30	.....	.90	" 21	11	60	.78
Aug. 15	....do	"	.....	....	2	30	.....	.60	Sept. 1	11	40	.78
Sept. 9	Glasgow.....	"	.....	....	1	40	.....	.40	" 9	11	41	.....
" 28	Persia	"	.....	....	4	40	.....	1.60	" 28	11	22	1.55.
Oct. 23	Etna.....	"	.....	....	1	30	.30	.....	.....	.....	.....	.....
				C.	4	30	1.20	1.50	Oct. 23	10	3.62	1.54
" 26	Teutonia	Hamburg.	.....	Ch.	1	15	.....	.15	" 26	10	3.59	.....
Nov.	Persia	L'pool	.....	....	2	30	.60	.....	.....	.....	.....	.....
					4	40	1.60	2.20	Nov. 7	10	347	1.53
" "	C. of New York .	"	.....	....	1	30	.....	.30	" 7	10	347	.....
" 23	Asia	.....	.....	....	1	15	.....	.15	" 23	10	331	.....
" "	Laxonia	Hamburg.	.....	....	1	30	.....	.30	" 23	10	331	.....
" 29	Fulton	Havre	.....	....	2	30	.60	.....	.....	.....	.....	.....
					1	40	.40	1. "	" 29	10	335	.76
									Sept. 28	10	22	.....
Dec. 9	Africa	L'pool	.....	....	1	40	.....	.40	Dec. 9	10	315	.....
" 17	Hansa	Bremen....	.....	....	17	30	.....	5.10	" 17	10	307	3.79
" 27	Arago	Havre	.....	....	1	15	.....	.15	" 27	10	297	.....
1862.									1862.			
Jan. 3	Borussia.....	Hamburg.	.....	....	1	30	.....	.30	Jan. 3	10	290	.....
" 25	C. of Manchester	L'pool	.....	....	2	30	.60	.....	.....	.....	.....	.....
				C.	7	30	2.10	2.70	" 25	10	268	2.25
Feby 4	C. of Washington	.....	.....	Ch.	2	40	.80	.....	.....	.....	.....	.....
				C.	5	40	2. "	2.80	Feby. 4	10	258	2.25
" 26	Edinburg	.....	.....	Ch	4	30	1.20	.....	.....	.....	.....	.....
					3	40	1.20	2.40	" 26	10	236	1.49
								31.65				24.66
1862.									1862.			
Mch. 4	Etna.....	L'pool	.....	Ch.	1	15	.15	.....	.....	.....	.....	.....
					14	30	4.20	.....	.....	.....	.....	.....
					2	40	.80	.....	.....	.....	.....	.....
				C.	16	30	4.80	9.95	Mch. 4	10	230	7.44
" 8	C. of New York..	"	.....	Ch.	3	30	.....	.90	" 8	10	226	.74
" 13	Arabia	"	.....	....	1	40	.....	.40	" 13	10	221	.....
" 15	Africa	"	.....	....	3	30	.90	.....	.....	.....	.....	.....
					7	40	2.80	3.70	" 15	10	219	2.97
" 26	Glascow	"	.....	....	2	30	.....	.60	" 26	10	208	.74
" 27	Edinburgh.....	"	.....	....	1	30	.30	.....	.....	.....	.....	.....
		"	.....	....	1	40	.40	.70	" 27	10	207	.74
" 28	China.....	"	.....	....	1	30	.....	.30	" 28	10	206	.....
April 1	New York.....	"	.....	....	3	30	.....	.90	Apl. 1	10	202	.74
" 4	Kangaroo.....	"	.....	....	4	30	1.20	.....	.....	.....	.....	.....
				C.	35	30	10.50	11.70	" 4	10	199	8.86
" 12	Etna.....	"	.....	Ch.	1	40	.....	.40	" 12	10	191	.....
" 24	Teutonia	Hamburg.	.....	....	6	30	.....	1.80	" 24	10	179	1.47
" "	C. of New York..	L'pool	.....	....	1	30	.....	.30	" 24	10	179	.....

Statement of excess of duty exacted on commissions, etc.—Continued.

Date of entry.	Name of vessel.	Where from.	Whence imported.	Exacted on—	Dutiable value.	Rate.	Duty.	Amount.	Date of payment.	Time. Years.	Time. Days.	Interest to October 20th, 1872.
1862.									1862.			
April 25	Persia	L'pool			1 15	.15						
					2 30	60						
" 26	Asia	"			3 40	1.20	1.95	Apl. 25		10	178	1.47
May 2	C. of Washington	"			2 30		.60	" 26		10	177	.73
" 6	Hammonia	Hamburg			3 30		.90	May 2		10	171	.73
" 9	Edinburg	L'pool			3 30		.90	" 6		10	167	.73
					8 30	2.40						
" 12	Hansa	Bremen		C.	9 30	2.70	5.10	" 9		10	164	3.66
				Ch.	1 30	.30						
					1 40	.40	.70	" 12		10	161	.73
" 14	Etna	L'pool			2 30	.60						
				C.	7 30	2.10	2.70	" 14		10	159	2.19
" "	....do	"		Ch.	3 30		.90	" 14		10	159	.73
" 21	Scotia	"			1 25		.25	" 21		10	152	
" 29	New York	Bremen			3 20	.90						
					2 40	.80	1.70	" 29		10	144	1.46
" 30	Kangaroo	L'pool			1 15		.15	" 30		10	143	
June 6	C. of New York	"			3 30	.90						
				C.	15 30	4.50	5.40	June 6		10	136	3.63
" 12	C. of Washington	"		Ch.	8 40		3.20	" 12		10	130	2.17
" 20	China	"			2 30	.60						
				C.	13 30	3.90	4.50	" 20		10	122	3.62
							60.60					45.55
107												
1862.									1862.			
June 21	Glascow	L'pool		Ch.	2 30		60	June 21		10	121	72
" 24	China	"			1 15		15	" 24		10	118	
" 26	Etna	"			4 40		1.60	" 26		10	116	1.44
" "	Bremen	Bremen			2 40		80	" 26		10	116	72
Apl. 12	Etna	L'pool			4 30		1.20	July 3		10	109	72
July 3	Rhine	London			4 25		1 "	" 3		10	109	72
" 3	Teutonia	Hamburg			2 15	30						
					4 30	1.20	1.50	" 3		10	109	1.44
" 16	C. of New York	L'pool			3 30	.90						
				C.	18 30	5.40	6.30	" 16		10	96	4.31
					1 30	.30						
" "	Borussia	Hamburg		Ch.	3 40	1.20	1.50	" 16		10	96	1.44
" 18	Persia	L'pool			1 30		.30	" 18		10	94	
" 23	New York	"			42 30		12.60	" 23		10	89	9.32
" 26	C. of Washington	"			1 15		.15	" 26		10	86	
" 30	Saxonia	Hamburg			7 40		2.80	" 30		10	82	2.15
" 31	Australasian	L'pool			1 30		.30	" 31		10	81	
" "	Edinburgh	"			1 40		.40	" 31		10	81	
Aug. 2	Teutonia	Hamburg			1 20		.20	Aug. 2		10	79	
" 15	Bavaria	"			6 35		2.10	" 15		10	66	1.43
" "	....do	"			6 35		2.10	" 15		10	66	1.43
" "	Scotia	L'pool			1 10	10						
					1 40	40	.50	" 15		10	66	.71
" "	C. of Baltimore	"			1 30	30						
					1 40	40						
				C.	1 30	30	1 "	" 15		10	66	.71
" 21	Hansa	Bremen		Ch.	3 10	30						
					2 30	60						
					6 35	2.10						
					3 40	1.20	4.20	" 21		10	60	2.85
" 28	Cullwater	L'pool			4 30	1.20						
				C.	16 30	4.80	6 "	" 28		10	53	4.26
" 30	Great Eastern	"		Ch.	1 35		.35	" 30		10	51	
" "	Teutonia	Hamburg			6 35		2.10	" 30		10	51	1.42
Sept. 3	Quesnel	Havre			6 35		2.20	Sept. 3		10	47	1.41
" 11	Hammonia	Hamburg			6 35		2.10	" 11		10	39	1.41
" 13	Australasian	L'pool			6 30		1.80	" 13		10	37	1.41
" "	C. of New York	"			1 35	35						
					4 40	1.60	1.95	" 13		10	37	1.41
							57.70					41.44

United States circuit court.

THOS. N. DALE ET AL.
vs.
HIRAM BARNEY.

Statement of excess of duty exacted on commissions added to invoice value of merchandise, above the usual rates, and charges exceeding those liable to duty under Treasury instructions dated May 21st, 1863, and the decisions of the courts. Imported by T. N. Dale & Co. Issued pursuant to report of Edwards Pierrepont, esq., referee, dated January 27th, 1873.

Date of entry.	Name of vessel.	Where from.	Whence imported.	Exacted on—	Dutiable value.	Rate.	Duty.	Amount.	Date of payment.	Time. Years.	Time. Days.	Interest to October 20th, 1872.
May 6	C. of Baltimore	L'pool	P. Ch. &c.	Ch.	2	30	.....	.60	May 6	11	167	.80
18	Arago	Havre	.....	.....	6	30	.....	1.80	June 3	11	139	1.59
June 3	New York	Bremen	.....	.....	6	15	.....	.90	" 3	11	139	.80
" 7	C. of Washington	L'pool	.....	.....	2	30	.60	.....	.....	.....	.....	.....
				C.	1	30	.30	.90	" 7	11	135	.80
July 2	Etna	"	.....	Ch.	2	30	.60	.....	.....	.....	.....	.....
				C.	3	30	.90	1.50	July 2	11	110	1.58
June 11	Fulton	Havre	.....	Ch.	4	30	.....	1.20	" 7	11	105	.79
106]1861.									1861.			
July 11	Edinburg	L'pool	.....	.....	1	30	.30	.....	.....	.....	.....	.....
				C.	4	30	1.20	1.50	July 11	11	101	1.58
" 10	Arago	Havre	.....	Ch.	1	30	.....	30	Aug. 16	11	65	.....
" 5	Persia	L'pool	.....	.....	3	30	.....	.90	" 21	11	60	.78
Aug. 15	....do	"	.....	.....	2	30	.....	.60	Sept. 1	11	40	.78
Sept. 9	Glasgow	"	.....	.....	1	40	.....	.40	" 9	11	41	.....
" 28	Persia	"	.....	.....	4	40	.....	1.60	" 28	11	22	1.55
Oct. 23	Etna	"	.....	.....	1	30	.30	.....	.....	.....	.....	.....
				C.	4	30	1.20	1.50	Oct. 23	10	3.62	1.54
" 26	Teutonia	Hamburg	.....	Ch.	1	15	.....	.15	" 26	10	3.59	.....
Nov.	Persia	L'pool	.....	.....	2	30	.60	.....	.....	.....	.....	.....
					4	40	1.60	2.20	Nov. 7	10	347	1.53
" "	C. of New York	"	.....	.....	1	30	.....	.30	" 7	10	347	.....
" 23	Asia	.....	.....	.....	1	15	.....	.15	" 23	10	331	.....
" "	Laxonia	Hamburg	.....	.....	1	30	.....	.30	" 23	10	331	.....
" 29	Fulton	Havre	.....	.....	2	30	.60	.....	.....	.....	.....	.....
					1	40	.40	1.	" 29	10	335	.76
									Sept. 28	10	22	.....
Dec. 9	Africa	L'pool	.....	.....	1	40	.....	.40	Dec. 9	10	315	.....
" 17	Hansa	Bremen	.....	.....	17	30	.....	5.10	" 17	10	307	3.79
" 27	Arago	Havre	.....	.....	1	15	.....	.15	" 27	10	297	.....
1862.									1862.			
Jan. 3	Borussia	Hamburg	.....	.....	1	30	.....	.30	Jan. 3	10	290	.....
" 25	C. of Manchester	L'pool	.....	.....	2	30	.60	.....	.....	.....	.....	.....
				C.	7	30	2.10	2.70	" 25	10	268	2.25
Feby 4	C. of Washington	.....	.....	Ch.	2	40	.80	.....	.....	.....	.....	.....
				C.	5	40	2. "	2.80	Feby. 4	10	258	2.25
" 26	Edinburg	.....	.....	Ch	4	30	1.20	.....	.....	.....	.....	.....
					3	40	1.20	2.40	" 26	10	236	1.49
								31.65				24.66
1862.									1862.			
Mch. 4	Etna	L'pool	.....	Ch.	1	15	.15	.....	.....	.....	.....	.....
					14	30	4.20	.....	.....	.....	.....	.....
					2	40	.80	.....	.....	.....	.....	.....
				C.	16	30	4.80	9.95	Mch. 4	10	230	7.44
" 8	C. of New York	"	.....	Ch.	3	30	.....	.90	" 8	10	226	.74
" 13	Arabia	"	.....	.....	1	40	.....	.40	" 13	10	221	.....
" 15	Africa	"	.....	.....	3	30	.90	.....	.....	.....	.....	.....
					7	40	2.80	3.70	" 15	10	219	2.97
" 26	Glascow	"	.....	.....	2	30	.....	.60	" 26	10	208	.74
" 27	Edinburgh	"	.....	.....	1	30	.30	.....	.....	.....	.....	.....
		"	.....	.....	1	40	.40	.70	" 27	10	207	.74
" 28	China	"	.....	.....	1	30	.....	.30	" 28	10	206	.....
April 1	New York	"	.....	.....	3	30	.....	.90	Apl. 1	10	202	.74
" 4	Kangaroo	"	.....	.....	4	30	1.20	.....	.....	.....	.....	.....
				C.	35	30	10.50	11.70	" 4	10	199	8.86
" 12	Etna	"	.....	Ch.	1	40	.....	.40	" 12	10	191	.....
" 24	Teutonia	Hamburg	.....	.....	6	30	.....	1.80	" 24	10	179	1.47
" "	C. of New York	L'pool	.....	.....	1	30	.....	.30	" 24	10	179	.....

Statement of excess of duty exacted on commissions, etc.—Continued.

Date of entry.	Name of vessel.	Where from.	Whence imported.	Exacted on—	Dutiable value.	Rate.	Duty.	Amount.	Date of payment.	Time. Years.	Time. Days.	Interest to October 20th, 1872.
1862.									1862.			
April 25	Persia	L'pool			1	15	.15					
					2	30	60					
					3	40	1.20	1.95	Apl. 25	10	178	1.47
" 26	Asia	"			2	30		.60	" 26	10	177	.73
May 2	C. of Washington	"			3	30		.90	May 2	10	171	.73
" 6	Hammonia	Hamburg			3	30		.90	" 6	10	167	.73
" 9	Edinburg	L'pool			8	30	2.40					
				C.	9	30	2.70	5.10	" 9	10	164	3.66
" 12	Hansa	Bremen		Ch.	1	30	.30					
					1	40	.40	.70	" 12	10	161	.73
" 14	Etna	L'pool			2	30	.60					
				C.	7	30	2.10	2.70	" 14	10	159	2.19
" "	do	"		Ch.	3	30		.90	" 14	10	159	.73
" 21	Scotia	"			1	25		.25	" 21	10	152	
" 29	New York	Bremen			3	20	.90					
					2	40	.80	1.70	" 29	10	144	1.46
" 30	Kangaroo	L'pool			1	15		.15	" 30	10	143	
June 6	C. of New York	"			3	30	.90					
				C.	15	30	4.50	5.40	June 6	10	136	3.63
" 12	C. of Washington	"		Ch.	8	40		3.20	" 12	10	130	2.17
" 20	China	"			2	30	.60					
				C.	13	30	3.90	4.50	" 20	10	122	3.62
								60.60				45.55
107												
1862.									1862.			
June 21	Glascow	L'pool		Ch.	2	30		60	June 21	10	121	72
" 24	China	"			1	15		15	" 24	10	118	
" 26	Etna	"			4	40		1 60	" 26	10	116	1 44
" "	Bremen	Bremen			2	40		80	" 26	10	116	72
Apl. 12	Etna	L'pool			4	30		1 20	July 3	10	109	72
July 3	Rhine	London			4	25		1 "	" 3	10	109	72
" 3	Teutonia	Hamburg			2	15	30					
					4	30	1 20	1 50	" 3	10	109	1 44
" 16	C. of New York	L'pool			3	30	90					
				C.	18	30	5 40	6 30	" 16	10	96	4 31
" "	Borussia	Hamburg		Ch.	1	30	30					
" 18	Persia	L'pool			3	40	1 20	1 50	" 16	10	96	1 44
" 23	New York	"			1	30		30	" 18	10	94	
" 26	C. of Washington	"			42	30		12 60	" 23	10	89	9 32
" 30	Saxonia	Hamburg			1	15		15	" 26	10	86	
" 31	Australasian	L'pool			7	40		2 80	" 30	10	82	2 15
" "	Edinburgh	"			1	30		30	" 31	10	81	
Aug. 2	Teutonia	Hamburg			1	40		40	" 31	10	81	
" 15	Bavaria	"			1	20		20	Aug. 2	10	79	
" "	do	"			6	35		2 10	" 15	10	66	1 43
" "	Scotia	L'pool			6	35		2 10	" 15	10	66	1 43
					1	10	10					
" "	C. of Baltimore	"			1	40	40	50	" 15	10	66	71
					1	30	30					
					1	40	40					
				C.	1	30	30	1 "	" 15	10	66	71
" 21	Hansa	Bremen		Ch.	3	10	30					
					2	30	60					
					6	35	2 10					
					3	40	1 20	4 20	" 21	10	60	2 85
" 28	Cullwater	L'pool			4	30	1 20					
				C.	16	30	4 80	6 "	" 28	10	53	4 26
" 30	Great Eastern	"		Ch.	1	35		35	" 30	10	51	
" "	Teutonia	Hamburg			6	35		2 10	" 30	10	51	1 42
Sept. 3	Quesnel	Havre			6	35		2 20	Sept. 3	10	47	1 42
" 11	Hammonia	Hamburg			6	35		2 10	" 11	10	39	1 41
" 13	Australasian	L'pool			6	30		1 80	" 13	10	37	1 41
" "	C. of New York	"			1	35	35					
					4	40	1 60	1 95	" 13	10	37	1 41
								57 70				41 44

Statement of excess of duty exacted on commissions, etc.—Continued.

Date of entry.	Name of vessel.	Where from.	Whence imported.	Exacted on—	Dutiable value.	Rate.	Duty.	Amount.	Date of payment.	Time. Years.	Time. Days.	Interest to October 20th, 1872.
1862.									1862.			
Sept. 17	New York	Havre		Ch.	3	35		1 05	Sept. 17	10	33	71
" 26	Borussia	Hamburg			3	35		1 50	" 26	10	24	70
" "	Scotia	L'pool			2	10	20					
					3	20	60					
					1	30	30					
					13	40	5 20	6 30	" 26	10	24	4 23
Oct. 1	C. of Baltimore	"			6	30	1 80					
					1	35	35					
					1	40	40					
				C.	26	30	7 80	10 35	Oct. 1	10	19	7 04
" 10	Saxonia	Hamburg		Ch.	14	35		4 90	" 10	10	10	3 51
" 13	Persia	L'pool			2	10	20					
					3	30	90					
					8	40	3 20					
				C.	8	30	2 40	6 70	" 13	10	7	4 91
" 28	Australasian	"		Ch.	3	20		60	" 28	9	357	70
" "	Bavaria	"			8	35		2 80	" 28	9	357	2 10
Nov. 11	Persia	"			2	30	60					
					9	40	3 60	4 20	Nov. 11	9	343	2 78
" 12	Glascow	"			1	35	35					
					1	40	40	75	" 12	9	342	70
" 15	Edinburg	"			4	35		1 40	" 15	9	339	70
" "	Mercury	Havre			4	35		1 40	" 15	9	339	70
Dec. 3	C. of Washington	L'pool			1	35		35	Dec. 3	9	321	
" "	Peter Rohland	Havre			6	35		2 10	" 3	9	321	1 38
1863.									1863.			
Jan. 22	C. of Baltimore	L'pool			3	40		1 20	Jan. 22	9	271	68
" "	Kangaroo	"			8	30		2 40	" 22	9	271	1 36
108												
1863.									1863.			
Feb. 13	C. of Manchester	L'pool			5	35	1.75					
					5	40	2 "					
				C.	6	35	2.10	5.85	Feb. 13	9	249	4.07
62.												
Dec. 15	Glascow	"		Ch.	3	40		1.20	" 14	9	248	.68
Nov. 14	C. of Baltimore	"			1	40		40	" 14	9	248	
6.												
Feb. 17	Asia	L'pool			5	10	.50					
					2	40	.80	1.30	" 17	9	245	.68
" 18	Bavaria	Hamburg			3	35		1.05	" 18	9	244	.68
" 28	Borussia	"			4	35		1.40	" 28	9	234	.67
Mch. 2	Glascow	L'pool			4	30	1.20					
					1	40	.40					
				C.	10	30	3 "	4.60	Mch. 2	9	232	3.37
								63.35				42.35
1863.									1863.			
Mch. 4	Kedar	L'pool		Ch.	2	10		.20	Mch. 4	9	230	
" 6	C. of New York	"			2	30		.60	" 6	9	228	.67
" "	New York	Bremen			2	30		.60	" 6	9	228	.67
" 13	C. of Baltimore	L'pool			3	30	.90					
				C.	12	30	3.60	4.50	" 13	9	221	3.36
				Ch.	14	30	4.20					
					13	40	5.20	9.40	" 17	9	217	6.04
" "	Teutonia	Hamburg			1	35		.35	" 17	9	217	
" 26	C. of Manchester	L'pool			1	10		.10	" 26	9	208	
" 30	Asia	"			1	20	.20					
					10	30	3 "					
					4	40	1.60	4.80	" 30	9	204	3.35
Apl. 2	Hausa	Bremen			5	35		1.75	Apl. 2	9	201	1.34
" 7	C. of Cork	L'pool			1	35		.35	" 7	9	196	
" 15	Bavaria	Hamburg			8	35		2.80	" 15	9	188	2 "
" 15	Africa	L'pool			2	30	.60					
					7	35	2.45					
					4	40	4.60	1.65	" 15	9	188	3.33
" 16	C. of New York	"			1	30	.30					
					1	35	.35	.65	" 16	9	187	.67
" 18	Bremen	Bremen			3	35		1.05	" 18	9	185	.67
" 23	Hammonia	Hamburg			4	35		1.40	" 23	9	180	.66

Statement of excess of duty exacted on commissions, etc.—Continued.

Date of entry.	Name of vessel.	Where from.	Whence imported.	Exacted on—	Dutiable value.	Rate.	Duty.	Amount.	Date of payment.	Time. Years.	Time. Days.	Interest to October 20th, 1872.
1863.									1863.			
Apl. 24	Persia	L'pool			2	30	.60					
					3	35	1.05					
					4	40	1.60	3.25	Apl. 24	9	179	1.99
May 5	St. Louis	Havre			6	35		2.10	May 5	9	168	1.32
" 7	C. of Manchester	L'pool			2	35		.70	" 7	9	166	.66
" 9	Australasian	"			3	30		.90				
" "	Etna	"			7	35	2.45	3.35	" 9	9	164	1.98
					1	33	.35					
" 19	C. of New York	"			1	40		.75	" 9	9	164	.66
" 21	C. of Washington	"			1	40		.40	" 19	9	154	
" 25	China	"			2	30		.60	" 21	9	152	.66
" "	Borussia	Hamburg			5	30		1.50	" 25	9	148	1.32
June 5	Sidon	L'pool			8	35		2.80	" 25	9	148	1.98
					4	30	1.20					
" 10	Hammonia	Hamburg			3	40	1.20	2.40	June 5	9	137	1.31
					4	35	1.40					
" 13	America	Bremen			4	40	1.60	3	" 10	9	132	1.97
					4	35		1.40	" 13	9	129	.65
								55.45				37.26
1863.									1863.			
Jan. 15	C. of Limerick	L'pool		Ch.	2	40		.80	June 15	9	127	.15
" 19	Olympus	"			2	30	.60					
					4	40	1.60	2.20	" 19	9	123	1.31
" 24	C. of New York	"			5	35		1.75	" 24	9	118	1.31
" 25	Sidon	"			3	35		1.05	" 25	9	117	.65
" "	Persia	"							" 25	9	117	
" "	Kangaroo	"			9	35		3.15	" 25	9	117	1.96
" 27	Bremen	Bremen			4	35		1.40	" 27	9	115	.65
109												
1863.									1863.			
July 10	China	L'pool			2	30	60					
					3	40	1.20	1.80	July 10	9	102	1.30
"	New York	Bremen			3	35		1.05	" 10	9	102	.65
"	Bavaria	Hamburg			4	35		1.40	" 10	9	102	.65
18	Borussia	"			8	35		2.80	" 18	9	94	1.94
24	Hausa	Bremen			6	35		2.10	" 24	9	88	1.29
"		L'pool		C.								
"	Sidon	"		Ch.	2	20	.40					
					2	30	.60	1	" 24	9	88	.65
29	C. of New York	"			2	30	.60					
				C.	6	30	1.80	2.40	" 29	9	83	1.29
Aug. 1	Hammonia	Hamburg		Ch.	6	35		2.10	Aug. 1	9	80	1.29
4	America	Bremen			3	35		1.05	" 4	9	77	.64
7	C. of Manchester	L'pool			6	30	1.80					
					2	40	.80	2.60	" 7	9	74	1.93
20	Bremen	Bremen			6	35		2.10	" 20	9	61	1.28
26	Sidon	L'pool			1	40		.40	" 26	9	55	
28	Persia	"			6	30	1.80					
					2	35	.70					
" 29	Teutonia	Hamburg			1	40	.40	2.90	" 28	9	53	1.92
Sept. 5	New York	Hamburg			6	35		2.10	" 29	9	52	1.28
					4	30	1.20					
					3	35	1.05	2.25	Sept. 5	9	45	1.28
11	C. of New York	L'pool		C.	6	30		1.80	" 11	9	39	1.27
"	Scotia	"		Ch.	3	30		.90	" 11	9	39	.64
14	C. of Manchester	"			6	35		2.10	" 14	9	36	1.27
17	Hausa	Bremen			3	35		1.05	" 17	9	33	.64
24	Majestic	L'pool			3	10		.30	" 24	9	26	
26	China	"			6	40	2.40					
					22	30	6.60	9	" 26	9	24	5.71
30	America	Bremen			3	35		1.05	" 30	9	20	.63
								54.60				34.08
1863.									1863.			
Oct. 7	C. of London	L'pool		Ch.	2	30	.60					
				C.	14	30	4.20	4.80	Oct. 7	9	13	3.16
24	C. of New York	"		Ch.	4	30	1.20					
				C.	11	30	3.30	4.50	" 24	8	361	3.15
"	Scotia	"		Ch.	4	40		1.60	" "	8	361	1.26
28	China	"			1	35		.35	" 28	8	357	

Statement of excess of duty exacted on commissions, etc.—Continued.

Date of entry.	Name of vessel.	Where from.	Whence imported.	Exacted on—	Dutiable value.	Rate.	Duty.	Amount.	Date of payment.	Time. Years.	Time. Days.	Interest to October 20th, 1872.
1863.									1863.			
Oct. 28	Bellona	L'pool			1	30	.30					
					5	40	2.30	2.30	Oct. 28	8	357	1.26
" 30	New York	Bremen			3	35		1.05	" 30	8	355	.63
Nov. 3	C. of Cork	L'pool			1	35		.35	Nov. 3	8	351	
7	China	"			2	30	.60					
					5	40	2 "					
				C.	4	30	1.20	3.80	" 7	8	347	2.51
23	Persia	"		Ch.	2	30	.60					
					4	35	1.40					
					4	40	1.60	3.60	" 23	8	331	2.49
28	C. of Baltimore	"			2	30	.60					
				C.	7	30	2.10	2.70	" 28	8	326	1.87
Dec. 12	Bremen	Bremen		Ch.	4	35		1.40	Dec. 12	8	312	.62
"	Etna	L'pool			2	30	.60					
				C.	8	30	2.40	3 "	" 12	8	312	1.86
21	C. of Cork	"		Ch.	1	35		.35	" 21	8	303	
23	Bavaria	Hamburg			2	35		.70	" 23	8	301	.62
28	Edinburg	L'pool			6	30	1.80					
				C.	3	30	.90	2.70	" 28	8	296	1.85
29	Kangaroo	"		Ch.	4	30		1.20	" 29	8	295	.62
1864.									1864.			
Jan. 2	C. of Manchester	"			1	35	.35					
				C.	3	35	1.05	1.40	Jan. 2	8	291	.62
4	Persia	"		Ch.	7	30	2.10					
					1	35	.35					
				C.	3	35	1.05	3.50	" 4	8	289	2.46
11	C. of Baltimore	"		Ch.	3	10	.30					
					2	30	.60					
110					4	35	1.40	2.30	" 11	8	282	1.23
1864.									1864.			
" 18	C. of London	"			2	30	.60					
					7	35	2.45					
				C.	17	30	5.10					
					29	35	10.15	18.30	" 18	8	275	11.03
" 18	Scotia			Ch.	5	30		1.50	" 18	8	275	1.23
								61.40				38.47
1864.									1864.			
Jan. 19	Glascow	L'pool		Ch.	2	10	.20		Jan. 19	8	274	.61
					4	30	1.20	1.40				
" 26	Etna	"			2	35		.70	" 26	8	267	.61
Feby. 1	C. of New York	"			5	30	1.50					
					5	35	1.75					
				C.	21	35	7.35	10.60	Feb. 1			6.71
" 5	Australasian	"		Ch.	5	10	.50					
					3	30	.90	1.40	" 5			.61
" "	C. of New York	"			6	10	.60					
					6	35	2.10	2.70	" 5			1.83
" 8	Edinburg	"			2	35		.70	" 8			.61
" 12	C. of Cork				1	35	.35					
					1	40	.40	.75	" 12	8	250	.61
" 16	Olympus	"			1	10	.10					
					1	35	.35					
				C.	9	35	3.15	3.60	" 16	8	246	2.43
" 18	C. of Washington	"		Ch.	3	30	.90					
					2	35	.70					
				C.	33	30	9.90	11.50	" 18	8	244	7.28
" 22	C. of Manchester	"		Ch.	2	30	.60					
					2	35	.70	1.30	" 22	8	240	.61
" 23	Virginia	"			1	30	.30					
				C.	10	30	3. "	3.30	" 23	8	239	1.82
" 27	Hecta	"		Ch.	1	30	.30					
					2	35	.70					
					2	40	.80	1.80	" 27	8	235	1.21
" "	C. of London	"			1	30	.30					
				C.	7	30	2.10	2.40	" 27	8	235	1.21
Mch. 7	Etna	"		Ch.	4	35		1.40	Mch. 7	8	227	.60
" "	Pennsylvania	"			1	30	.30					
				C.	8	30	2.40	2.70	" 7	8	227	1.81

Statement of excess of duty exacted on commissions, etc.—Continued.

Date of entry.	Name of vessel.	Where from.	Whence imported.	Exacted on—	Dutiable value.	Rate.	Duty.	Amount.	Date of payment.	Time. Years.	Time. Days.	Interest to October 20th, 1872.
1864.									1864.			
Mch. 7	C. of New York..	L'pool	.....	Ch.	4	35	.....	1.40	Mch. 11	8	223	.60
	....do	"	.....		1	30	.30	.....	.....	.....	.....	.....
					3	35	1.05	.....	.....	.....	.....	.....
				C.	7	30	2.10	.....	.....	.....	.....	.....
" 12	Sidon	"	.....		7	35	2.45	5.90	" 11	8	323	3.62
				Ch.	6	30	1.80	.....	.....	.....	.....	.....
					3	35	1.05	.....	.....	.....	.....	.....
					2	40	.80	3.65	" 12	8	222	2.41
								57.20				35.19
1864.									1864.			
Mch. 14	Australasian	L'pool	.....	Ch.	1	30	.30	.....	.....	.....	.....	.....
					2	35	.70	.....	.....	.....	.....	.....
					2	40	.80	1.80	Mch. 14	8	220	1.20
" 18	Edinburg	"	.....		2	35	.....	.70	" 18	8	216	.60
" 19	.. do	"	.....		2	35	.....	.70	" 19	8	215	.60
Feb. 22	C. of Manchester	"	.....		3	35	1.05	.....	.....	.....	.....	.....
				C.	20	35	7. "	8.05	" 22	....	.....	4.81
Mch. 25	China.....	"	.....	Ch.	1	30	.30	.....	.....	.....	.....	.....
					1	40	40	.70	" 25	8	209	.60
" "	C. of Washington	"	.....		2	35	.....	.70	" 25	8	209	.60
Feby. 24	Louisiana.....	"	.....		7	30	...	2.10	" 27	8	207	1.20
" 27	Kangaroo.....	"	.....		4	35	1.40	.....	.....	.....	.....	.....
				C.	21	35	7.35	8.75	" 31	8	203	5.31
Mch. 31	C. of Manchester	"	.....	Ch.	4	35	.....	1.40	" 31	8	203	.60
April 5	C. of Cork	"	.....		1	30	.30	.....	.....	.....	.....	.....
111				C.	7	30	2.10	2.40	Apl. 5	8	198	1.20
Mch. 21	Edinburg	"	.....	Ch.	2	30	60	.....	.....	.....	.....	.....
					8	35	2.80	.....	.....	.....	.....	.....
					7	30	2.10	.....	.....	.....	.....	.....
					46	35	16.80	21.60	" 6	8	197	13.15
" 22	C. of Baltimore ..	"	.....	Ch.	3	35	1.05	.....	.....	.....	.....	.....
				C.	15	35	5.25	6.30	" 7	8	199	3.59
Apl. 8	C. of London....	"	.....	Ch.	4	35	.....	1.40	" 8	8	195	60
12	Persia	"	.....	...	2	30	60	.....	.....	.....	.....	.....
					1	35	35	.....	.....	.....	.....	.....
				C.	7	30	2.10	.....	.....	.....	.....	.....
					11	35	3.85	6.90	" 12	8	191	4.18
Mch. 25	C. of Washington	"	.....	Ch.	1	35	35	.....	.....	.....	.....	.....
				C.	8	35	2.80	3.15	" 15	8	188	1.79
Apl. 6	Hecla.....	"	.....	Ch.	2	35	70	.....	.....	.....	.....	.....
				C.	15	35	5.25	5.95	" 15	8	188	3.58
15	Etna.....	"	.....	Ch.	4	35	.....	1.40	" 15	8	188	60
	C. of Limerick...	"	.....	...	1	30	30	.....	.....	.....	.....	.....
					1	35	35	.....	.....	.....	.....	.....
				C.	13	30	3.90	.....	.....	.....	.....	.....
					9	35	3.15	7.70	" 20	8	183	4.76
				Ch.	...	...	.....	.....	" 21	8	182	.....
23	Kangaroo.....	L'pool	.....	...	4	35	... ..	1.40	" 23	8	180	59
29	C. of Baltimore...	"	.....	...	1	30	30	.....	.....	.....	.....	.....
					2	35	70	.....	.....	.....	.....	.....
				C.	2	30	60	1.60	" 29	8	174	1.19
								84.70				50.83
1864.												
May 9	Scotia	L'pool	.....	Ch.	2	30	60	.....	.....	.....	.....	.....
					2	40	80	1.40	May 9	8	164	59
" 28	C. of Limerick ...	"	.....	...	1	30	30	.....	" 28	8	145	4.70
				C.	24	30	7.20	7.50				
" 9	Olympus.....	"	.....	Ch.	4	10	.....	40	June 6	8	136	.....
June 17	....do	"	.....	...	1	40	.....	40	" 17	8	125	.....
" 1	Kedar	"	.....	...	2	20	40	.....	.....	.....	.....	.....
					3	30	90	.....	.....	.....	.....	.....
					1	35	35	.....	.....	.....	.....	.....
				C.	10	30	3 "	.....	.....	.....	.....	.....
					8	35	2.80	7.45	" 20	8	122	4.08
May 9	Scotia	"	.....	Ch.	2	30	60	.....	.....	.....	.....	.....
					1	35	35	.....	.....	.....	.....	.....
				C.	13	30	3.90	.....	.....	.....	.....	.....
					9	35	3.15	8 "	" 23	8	119	4.66

Statement of excess of duty exacted on commissions, etc.—Continued.

Date of entry.	Name of vessel.	Where from.	Whence imported.	Exacted on—	Dutiable value.	Rate.	Duty.	Amount.	Date of payment.	Time. Years.	Time. Days.	Interest to October 20th, 1872.
1864.									1884.			
June 14	Virginia	L'pool		Ch.	2	30	60					
					1	35	35					
" 30	C. of London	"		C.	15	30	4.50	5.45	July 12	8	100	2.90
1	Atalanta	London		Ch.					" 25	8	87	
					3	30	90					
					3	40	1.20	2.10	Aug. 24	8	57	1.14
							20					
May 19	Hecla	L'pool			1	20	80	1.10	" 24	8	57	57
				C.	4	20						
								33.70				18.63

112 *Statement of excess of duty exacted on commissions, &c.*—Continued.

RECAPITULATION.

Page.	Principal.	Interest.
1	$31.65	$24.66
2	60.60	45.55
3	57.70	41.44
4	63.35	42.35
5	55.45	37.26
6	54.60	34.08
7	61.40	38.47
8	57.20	35.19
9	84.70	50.83
10	33.70	18.36
	560.35	368.46
Interest to Oct. 20, '72	368.46	
	928.81	
Int. on 560 to Jan'y 27, '73	10.65	
	939.46	

To the collector of customs at the port of New York:

SIR: We protest against paying duty on two and a half per centum commissions, as charged on the merchandise embraced in the annexed entry, believing by law said goods are liable only to duty on one and a half per centum commission, that being the usual rate of commissions in the principal markets of the country from which said merchandise is imported. We claim that we ought not to be prejudiced by the fact that two and a half per centum is charged on the invoice, because that rate has been added by the consignor to conform to the requirements at the custom-house, and not because such commission was paid, or was the usual rate in the market whence the merchandise is imported.

SIR: We protest against the payment of duty charged on the addition made to the annexed entry for freight or charges from Havre to Liverpool, believing that under existing laws said merchandise is liable only to a duty ad valorem upon the fair market value at Havre at the time of shipment from that port—said port being the port of exportation to the

United States; that said goods were shipped from Havre to New York via Liverpool because of the greater facilities for rapid transportation by that route; that we contracted for the freight of said goods from Havre to New York at a fixed rate, payable on delivery at New York, and no additional compensation was allowed, nor abatement in price made by reason of any departure from the direct route from Havre to New York, and we pay the amount exacted in order to get possession of the goods.

You are hereby notified that we desire and intend this protest to apply to all future similar importations made by us.

(Signed) THOS. N. DALE & CO.

(Copy of protest, str. City of Baltimore, May 6th, 1861.)

(Indorsed:) U. S. circuit court, southern district of New York. Thomas N. Dale et al. vs. Hiram Barney. Referee's report. Edwards Pierrepont, referee. Refiled Dec. 8th, 1875. Filed Ap'l 4, 1873.

113 U. S. circuit court, southern district of New York.

THOMAS N. DALE & AL.
vs.
HIRAM BARNEY.

The defendant hereby excepts to the report of Edwards Pierrepont, referee, filed December 8, 1874, and especially to the following parts thereof:

To each and every part concerning the items adjusted upon importation prior to February 3, 1862, including the following importations, viz:

May 6, 1861, by the City of Baltimore.
May 18, 1861, by the Arago.
June 3, 1861, by the New York.
June 7, 1861, by the City of Washington.
July 2, 1861, by the Etna.
June 11, 1861, by the Fulton.
July 11, 1861, by the Edinburgh.
July 10, 1861, by the Arago.
July 5, 1861, by the Persia.
August 15, 1861, by the Persia.
September 9, 1861, by the Glasgow.
September 28, 1861, by the Persia.
October 23, 1861, by the Etna.
October 26, 1861, by the Teutonia.
November 7, 1861, by the Persia.
November 7, 1861, by the City of New York.
November 23, 1861, by the Asia.
November 23, 1861, by the Saxonia.
November 29, 1861, by the Fulton.
December 9, 1861, by the Africa.
December 17, 1861, by the Hansa.
December 27, 1861, by the Arago.
January 3, 1862, by the Borussia.
January 25, 1862, by the City of Manchester.

And upon the several amounts of each of said items, and the total sum of which they are made a part, and this upon the ground that said items were not included in the order upon which it was referred to the said referee to adjust the amount for which plaintiffs are entitled to a verdict herein, and upon the ground that any recovery of plaintiffs against the defendant upon said items is barred by the statute of limitations duly interposed thereto in this action, and the referee having included in the amount named in his report an allowance for such items, notwithstanding the objection of defendant thereto, duly taken before him upon these said grounds, the said report is in the said respect erroneous.

GEO. BLISS,
Def't's Att'y.

NEW YORK, *December* 8, 1874.

(Endorsed:) U. S. circuit court. Thomas N. Dale & al. vs. Hiram Barney. Exceptions to referee's report. Geo. Bliss, def't's att'y. Filed Dec. 10, 1874.

114 U. S. circuit court, southern district of New York.

THOMAS N. DALE ET AL.
vs.
HIRAM BARNEY.

On reading the report of the referee in the above-entitled action, filed in the office of the clerk of this court December 8th, 1874, and the defendant's exceptions to said report coming on to be heard, Almon W. Griswold appearing for the plaintiffs, and George Bliss, esquire, U. S. district attorney, appearing for the defendant, and due deliberation had, it is ordered and adjudged that the report of the referee be, and the same is, hereby confirmed, and the defendant's exceptions to said report be, and the same are hereby, overruled, and that the plaintiffs have judgment for the amount reported due by the referee.

SAM'L BLATCHFORD.

Dated April 28th, 1875.

(Endorsed:) U. S. circuit court, southern district of N. Y. Thomas N. Dale et al. vs. Hiram Barney. Order overruling d'ft's exceptions & confirming referee's report. A. W. Griswold, pl'ffs' att'y. Filed Apr. 20th, 1875.

Satisfaction of judgment.

U. S. circuit court, southern district of New York.

THOMAS N. DALE ET AL.
against
HIRAM BARNEY.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Satisfaction is acknowledged between Thomas N. Dale, George Richmond, John R. Harris, & Joseph H. Brown, plaintiffs, and Hiram Barney, defendant, for the sum of $939.46 in gold and silver coin, & $362.70

in currency, together thirteen hundred and two & $\frac{16}{100}$ dollars. Judgment entered in the judgment book of the clerk of the U. S. circuit court for the south. dist. of New York the 5th day of October, one thousand eight hundred and seventy six, and the plaintiffs hereby waive payment in coin, except as to the sum of $531.10.

ALMON W. GRISWOLD,
Pl'ff's' Att'y.

Acknowledged before me the 22d day of November, 1876, by Almon W. Griswold, known to me to be the attorney for the plaintiffs in the above action.

J. M. DEUEL,
Dept. Clerk.

(Indorsed:) U. S. circuit court. Thos. N. Dale et al. against Hiram Barney. Satisfaction piece. A. W. Griswold, pl'ff's att'y. Filed Nov. 22d, 1876.

UNITED STATES OF AMERICA, *ss:*

To Thomas N. Dale, George Richmond, John R. Harris, Joseph H. Brown, and their attorney, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second
115 Monday of October, eighteen hundred and seventy-eight, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Hiram Barney is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Dated July 31, 1878.

SAM'L BLATCHFORD.

(Indorsed:) A 171. U. S. Supreme Court. Hiram Barney, plaintiff in error, against Thomas N. Dale, George Richmond, John R. Harris, & Joseph H. Brown, defendants in error. Citation. Stewart L. Woodford, att'y for pl'ff in error. U. S. circuit court. Filed Aug. 1, 1878. John L. Davenport, clerk.

I hereby admit service of a copy of the within.

ALMON W. GRISWOLD,
Att'y for Def'ts in Error.

AUG. 1, '78.

(Indorsement on cover:) No. 138. Hiram Barney, late collector, &c., plaintiff in error, vs. Thomas N. Dale, George Richmond, John R. Harris, & Joseph H. Brown. S. New York, C. C. U. S. Filed 2nd December, 1878.

116 PLAINTIFF'S EXHIBIT, B.

In the Supreme Court of the United States, October term, 1881.

BARNEY, LATE COLLECTOR,
vs.
DALE, &c. } No. 138.

Brief for the plaintiff in error.

Assumpsit (charges and commissions) begun in February, 1868, damages, $2,000; plea, general issue and statute of limitations. Folios 9, 13, and 15. Issue upon first plea and reply to second plea, non-residence of defendants; rejoinder, that non-residence was not of sufficient length of time to affect plea.

Reference, April, 1871, and report, January, 1873. Folios 24 and 27.

Judgment, including costs, $1,302.16. October, 1876. Folio 21.

S. F. PHILLIPS,
Solicitor-General.

PLAINTIFF'S EXHIBIT, C.

UNITED STATES OF AMERICA, *ss.:*

The President of the United States of America to the honorable the judges of the circuit court of the United States for the southern district of New York, greeting:

Whereas, lately in the circut court of the United States for the southern district of New York, before you, or some of you, in a cause between Thomas N. Dale, George Richmond, John R. Harris, and Joseph H. Brown, plaintiffs, and Hiram Barney, defendant, wherein the judg-
117 ment of the said circuit court entered in said cause was in favor of the said plaintiffs, Thomas N. Dale et al., and against the said defendant, as by the inspection of the transcript of the record of the said circuit court, which was brought into the Supreme Court of the United States by virtue of a writ of error agreeably to the act of Congress, in such cases made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand eight hundred and eight-one, the said cause came on to be heard before the said Supreme Court on the said transcript of record, and on motion of Mr. Solicitor-General Phillips, of counsel for the plaintiff in error, it is now here ordered and adjudged by this court that the writ of error in this cause be, and the same is hereby, dismissed with costs; and that the said plaintiffs, Thomas N. Dale et al., recover against defendant five dollars for their costs herein expended, and have execution therefor.

27th October, 1881.

You, therefore, are hereby commanded that such execution and proceedings be had in said cause as according to right and justice and the laws of the United States ought to be had, the said writ of error notwithstanding.

Witness the honorable Morrison R. Waite, Chief-Justice of said Supreme Court, the thirty-first day of October, in the year of our Lord one thousand eight hundred and eighty-two.

Costs of plaintiffs: clerk, $5.

[SEAL.] Taxed by JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

118 EXHIBIT D.

OFFICE OF THE UNITED STATES ATTORNEY,
FOR THE SOUTHERN DISTRICT OF NEW YORK,
New York, May 11th, 1874.

Hon. WILLIAM A. RICHARDSON,
Secretary of the Treasury:

SIR: On the 29th of December, 1870, verdicts in 100 cases against collectors of customs in certain "charges and commissions" suits were taken by consent.

I enclose a copy of the general verdict, marked No. 1, by which you will see that the verdict was upon certain illegal exactions "not barred by the statute of limitations." It did not appear that the statute of limitations had been pleaded in any of the cases, and although it might have been interposed in many of them, only a plea of general issue was put in. These cases were referred to the collector of the port for adjustment, and many of them have been determined and paid. In some cases it appeared upon the adjustment that certain items were barred by the statute of limitations, and were accordingly omitted by the collector in his adjustment, such omission being known to and not opposed by the attorney for the plaintiffs.

In one of these cases, R. McC. Butt & al. v. Augustus Schell, O. S. 1619, application has recently been made to the court for instruc-
119 tions to the collector to include in his statement sums paid more than six years before the commencement of the suit. I opposed the motion and read the affidavit of Mr. Davies, a copy of which I enclose, marked No. 2. This was met by an affidavit of Mr. E. D. Smith, marked No. 3.

Judge Blatchford, before whom the motion was made, said in effect that the proper construction of the words "not barred by the statute of limitations" would only exclude items relative to which the statute had been pleaded, and that there was no bar from lapse of time without the proper plea. He therefore made the order, a copy of which I mark No. 4.

The effect of this last decision will be, I believe, to let in claims for many thousands of dollars, probably over a hundred thousand, against the Government, whereby the merchants will benefit but slightly.

It seems to me that this is a climax to a long series of motions and changes, which should induce some determined action on the part of the Government. All the questions which can be raised in these "charges and commissions" cases have been decided, and with almost entire uniformity against the Government. Not only have all the points as to prospective protests, protest, to one collector binding another, &c., &c., been so decided, but judgments adjusted for years and paid have on motion been opened and large additional amounts recovered—in one case $60,000. Actions with different plaintiffs have been consolidated, bills of particulars been amended, most extraordinary alleged errors in names been allowed to be corrected, whereby large amounts have been taken from the Treasury. In short it does not seem possible for
120 any motion, however extraordinary, to be made without its being granted. One is made a precedent for another going a little further, and so it goes on.

In saying this I do not mean to reflect upon Judge Blatchford, who has

made the decisions. He has formed strong opinions as to the law of the cases and justice of the claims, and, of course, conscientiously carries them out. But I think an appellate tribunal would differ from him in some of them.

I have already expressed to the Solicitor verbally my opinion that a great mistake was originally made in not taking one or more of these cases to the Supreme Court. Though hundreds of thousands of dollars have been taken from the Treasury, it is not too late to attempt to save as much more. Nearly or quite five hundred of these cases have not yet gone to judgment. I have therefore to request that I may be authorized to take writs of error in a sufficient number of these cases to present fairly the questions involved in the cases. The expense to the Government will be but slight compared to the possible saving. I have for sixteen months seen this system going on, chafing but thinking I had no course except to acquiesce in the former decisions of my superiors and the course of my predecessors, but I can not, in justice to the Government or myself, do so longer. If the Department thinks no writs of error should be taken, I shall of course acquiesce, and do my best to dispose of the remaining cases as speedily as possible.

Very respectfully,

GEORGE BLISS,
U. S. Attorney.

121 EXHIBIT E.

OFFICE OF THE UNITED STATES ATTORNEY
FOR THE SOUTHERN DISTRICT OF NEW YORK,
New York, June 4th, 1874.

Hon. B. H. BRISTOW,
Secretary of the Treasury:

SIR: In reply to the letter of your predecessor dated May 23rd, 1874 (H. B. J.), directing me to report what questions in the so-called "commissions and charges" cases I desired to have brought before the Supreme Court for its decision, I beg to say that the following are the points which seem especially important to me, though in case writs of error should be taken others will doubtless come up incidentally:

1. The entire question of what are dutiable charges under the act of March 3rd, 1851, vol. 9, p. 629, should be passed upon.

2. Where goods have been invoiced "free on board," it has been the practice (since Benkard v. Schell was tried) to refund duties paid on charges added by importers "by compulsion" to make market value. This point should be reviewed.

3. The sufficiency of a continuous or a prospective protest should be taken up. If good, to what extent?

4. The question whether a protest addressed to one collector is applicable to his successor, if prospective protests are valid, should be settled.

5. The necessity of an appeal to the Secretary of the Treasury upon the decision of the collector against which the importer protests, under the act of 1857.

122 The decisions upon all the questions in this circuit have been, I am bound to say, adverse to the Government. Most of them have

been presented more than once. This, I think, is true of all of them except the question of the sufficiency of a protest to one collector as binding another. Judge Blatchford has recently decided it adversely to the Government, but Judge Nelson some years since expressed a different view.

I think the Department has heretofore acquiesced in the decisions upon these points except as to the prospective protests. The question of a protest to one collector binding another has, I believe, never been before the Department. As to the question of prospective protests generally, I think, but am not sure, that the Department has acquiesced without its judgment being convinced.

Since the question of appeal has been mooted the counsel interested have intimated that they were prepared to abandon all cases and items dependent upon the validity of a protest made to one collector as binding his successor, provided an appeal as to the other questions was abandoned. They say that they have no fears as to the result of an appeal, but desire to avoid the additional delay, and insist that they will be put in an embarrassing position with reference to their clients if, after part have been paid, further litigation is persisted in as to the others.

The force to be given to these and other arguments it is not for me to measure. I am perfectly clear, if I may say so without improperly
123 criticising the action of your predecessors, that in cases involving so much money and presenting questions as to which opinions may fairly differ, and where, too, the merchant having charged to the consumer all he has paid has no great equity in his claim, ought originally to have been carried to the court of last resort. That the matter now stands in a different position from what it originally did is true. The only question is now, it seems to me, whether the past acquiescence does not render an appeal inequitable.

Very respectfully,

(Signed) GEORGE BLISS,
U. S. Attorney.

124 EXHIBIT F.

TREASURY DEP'T,
Washington, D. C., June 10, 1874.

SIR: I have the honor to enclose herewith a copy of a letter from Geo. Bliss, esq., U. S. att'y for the southern dist. of N. Y., relative to the propriety of taking to the U. S. Supreme Court one or more cases involving certain questions of law therein referred to.

These cases are what are commonly known in this Dep't as the charges and commission cases, and embrace claims for overpaid duties on charges and commissions under the act of Mch. 3d, 1851, Stats. at Large, vol. 9, page 629. The questions of law cited by the dist. att'y have heretofore, in several different cases, been decided by the U. S. circuit court at N. Y. adversely to the Gov't (see Hutton vs. Schell, 6 Blatch., 48), which decision has been acquiesced in by this D'p't, with the exception of the question as to whether a protest filed with one collector of customs is valid against his successor in office.

As the duty of arguing these questions in the Supreme Court will devolve upon you, should the Department decide to take the case there for

review, I have the honor to request that you give the matter your examination and inform me whether, in your judgment, the points of law raised by the dist. att'y are of sufficient importance in these cases to justify the Dep't in suing out a writ of error to obtain the judgment of the Supreme Court in regard thereto.

125 I also enclose a brief prepared several years since by a gentleman then in this Dep't, as also a report from Edward Jordan, esq., former Solicitor of the Treasury, dated August 5th, 1867, in relation to the points raised in the cases in question.

I will thank you to return the two latter documents.

I am, &c.,

B. H. BRISTOW,
Secretary.

Hon. GEO. H. WILLIAMS,
U. S. Attorney-General, Washington, D. C.

126 EXHIBIT G.

DEPARTMENT OF JUSTICE, *June 25th*, 1874.

The SECRETARY OF THE TREASURY:

SIR: In response to yours of the 10th instant, asking for the opinion of the Attorney-General whether writs of error shall be prosecuted in what are known as the charges and commissions cases recently determined in the southern district of New York, I submit the following considerations:

Inasmuch as your reference to the questions involved is very general, I will refer to them as given in the letter of George Bliss, esq., U. S. attorney, &c., addressed to you on the 4th of June last. I understand these questions to be interesting to the Government only so far as regards transactions now past, inasmuch as the statute at present in force (13 Stat., 214, sec. 14, and 217, sec. 25), as regards protests and valuations, makes special provision for the matters herein at issue. I think it true that some of the principles which have been established by former Secretaries, as well as by circuit courts of the United States, in cases like those before you, might well in former years have been brought by the Government before the Supreme Court. The propriety of doing so at present makes a very different question, inasmuch as those principles have been acquiesced in for year after year, and have formed the basis upon vast amounts of business have been transacted in good faith between the Government

127 on one side and importers on the other, the more so that, as said above, under the recent change of legislation, the reversal of that series of decisions is not to effect future business. This remark is especially applicable to cases involving the necessity of protests, and their forms under certain circumstances. As to such matters of practice, as it were, the United States is to be held bound by its acquiescence for a number of years in the decisions of its own officers, judicial and executive. The proper relief is that which has been administered, viz., an amendment of the statute.

The question as to what charges and commissions appraisers were before the statute of June 30th, 1864, to include in ascertaining the dutiable value of goods imported is somewhat a different one. If that question had not been set at rest for the future by the above legislation (13 Stat.,

217, sec. 24), there might be no objection to have it reconsidered. It was under the previous statute debatable, and some time since would have justified officers of the Government in bringing it before the Supreme Court. As it is, however, the vast majority of the cases presenting the question has uniformly been decided by the Secretaries and by the courts adversely to the Government.

It is not improbable that such decisions were correct; at all events it is hardly seemly to question their application to that comparatively small remnant of cases upon which the old law still operates.

128 I understand Mr. Bliss to say that the parties who brought suit will abandon the issue as to protests addressed to some predecessor of the collector sued, in case the United States brings no writs of error as to the other points. I therefore say nothing in regard to the validity of such protests. Upon this issue being abandoned, I advise that the United States do not bring writs of error in the cases above referred to.

Very respectfully, your obed't serv't,

S. F. PHILIPS,
Solicitor-General.

Approved June 29th, 1874.

GEO. H. WILLIAMS,
Attorney-General.

129 EXHIBIT H.

TREASURY DEPARTMENT,
Washington, D. C., July 1st, 1874.

SIR: Respectfully referring to your letter of the 11th ultimo, relative to this Department suing out a writ of error to have the charges and commissions cases reviewed by the Supreme Court, I have to say that your letter, and all papers necessary to an understanding of the case, were sent to the Attorney-General for his opinion as to what course should be taken by this Department in the premises.

I am now in receipt of a reply thereto from the Solicitor-General, approved by the Attorney-General, in which he takes the ground that, in view of the long-continued acquiescence by this Department in the previous action of the courts in this class of cases, and the instructions issued in regard thereto by the various Secretaries of the Treasury, it is not expedient to take the cases in question to the Supreme Court. This opinion is qualified, however, to this extent, that it having been proposed by the parties in interest to abandon the issue, as to whether protests addressed to and filed with one collector are valid as against his successor in office, stipulation to that effect should be made as a condition precedent thereto. Upon due examination of the matter, I concur in the opinion thus expressed, and consequently writs of error in these cases will not be sued out, provided written stipulations be filed on the part of the parties

130 in interest, agreeing to abandon the issue as to the validity of the protests thus referred to.

I am, very respectfully,

B. H. BRISTOW,
Secretary.

GEORGE BLISS, Esq.,
U. S. Attorney, New York:

In consideration of within I hereby stipulate to abandon the issue as to the validity of protests addressed to and filed with one collector as against his successor in office, and agree to make no claim by virtue of any such protests.

E. DELAFIELD SMITH,
Plaintiff's' Attorney.
ALMON W. GRISWOLD,
Plff's Atty.

NEW YORK, *Aug. 1st*, 1874.

131 EXHIBIT I[1].

U. S. circuit court, southern district of New York.

In the matter of certain suits brought to recover duties paid on certain charges and commissions wherein orders of reference have heretofore been made to Edwards Pierrepont and to John I. Davenport.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

George Bliss, being duly sworn, says that he has received from the Solicitor of the Treasury instructions of which a copy is hereto annexed.

GEORGE BLISS.

Sworn to before me this 21st day of May, 1875.

JOHN A. OSBORN,
U. S. Comm'r.

132 EXHIBIT I[2].

DEPARTMENT OF JUSTICE,
OFFICE OF THE SOLICITOR OF THE TREASURY,
Washington, D. C., May 11th, 1875.

SIR: You are directed to take immediate steps to have the order of the court, referring the cases known as the "Charges and commissions cases" to a referee, reversed. When this has been done I desire that all the legal questions arising in the cases pending may be presented to the court for decision and exceptions taken with a view of carrying the cases to the Supreme Court for adjudication, or that the proper measures may be had to bring about this result.

When the Secretary of the Treasury determined, some months ago, not to disturb the reference he came to this conclusion upon representations made, not by your office, however, that the amount involved in the cases was not large, but it has since been ascertained that the sums to be paid are of such magnitude as to make it necessary to adopt the course now indicated by me.

For this reason you will act upon the matter at once and report the result.

Very respectfully,

Solicitor of the Treasury.

GEORGE BLISS, Esq.,
U. S. Attorney, New York.

133 EXHIBIT I[2].

U. S. circuit court, southern district of New York.

In the matter of certain suits brought to recover duties paid on certain charges and commissions wherein orders of reference have heretofore been made to Edwards Pierrepont and to John I. Davenport.

A. W. GRISWOLD, Esq., *Attorney for Plaintiffs:*

SIR: Please take notice that upon the affidavit, a copy of which is annexed, I shall move this court on Saturday, the 22d day of May, 1875, at 11 o'clock a. m., or as soon thereafter as counsel can be heard, at the court rooms in the U. S. court building, No. 41 Chambers street, New York, for an order vacating and setting aside the order made by this court on the 22nd day of April, 1871, in a part of suits above referred to by which such suits were referred to Edwards Pierrepont, esq., to ascertain the amounts due the respective plaintiffs so far as relates to suits still unreported by said referee, also that the stipulation upon which said order was granted be set aside and cancelled. Also for a further order that the order made by this court on the 13th of August, 1872, by which a number of the suits above referred to were referred to Edwards Pierrepont to ascertain the amounts due the respective plain-
134 tiffs, so far as relates to suits in which no reports have been made by said referee, also that the stipulation upon which said order was made be set aside and cancelled. Also for a further order that the two orders made by this court on the 4th day of December, 1874, by which a number of the suits above referred to were referred to John I. Davenport, esq., to ascertain the amounts due the respective plaintiffs, so far as said orders relate to suits in which no reports have as yet been made by said referee; also that the stipulations upon which said orders were made be set aside and cancelled.

New York, May 18, 1875.

Yours, &c.,

GEORGE BLISS, *Deft's Atty.*

135 EXHIBIT I[3].

At a special term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms in the city of New York, on the 24th day of May, in the year of our Lord one thousand eight hundred and seventy-five.

Present: The honorable Samuel Blatchford, circuit judge.

In the matter of certain suits brought to recover duties paid on certain charges and commissions wherein orders of reference have heretofore been made to Edwards Pierrepont and John I. Davenport.

After hearing Mr. George Bliss, U. S. attorney, for the motion, and A. W. Griswold, opposed thereto:

Ordered, That said motion be denied, without prejudice to a motion upon a specific point or question which may heraafter be presented to the court.

(Signed.) SAM'L BLATCHFORD.

A copy.

KENNETH G. WHITE, *Clerk.*

136 EXHIBIT K.

H. B. J.
9594 *d*.

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
Washington, D. C., February 16, 1885.

COLLECTOR OF CUSTOMS, *New York*:

SIR: Under date of the 12th ultimo, the Department authorized the United States attorney at New York to consent to the discontinuance of the suit O. S. 94 of Vatable et al. vs. Schell and other similar suits now pending for the recovery of illegal customs fees, on a basis suggested by Mr. A. W. Griswold, attorney for the plaintiffs, which involved the payment on consumption entries of as many fees for orders as there are invoices, and on warehouse entries in which there is but one invoice one order, and where there are more than one invoice one order for every two invoices.

On discontinuance of any suit involving the question, you are authorized to prepare and forward a certified statement on the basis above specified, and in accordance with the Department's instructions of April 12th, 1883.

Very respectfully,

(Sgd.) H. F. FRENCH,
Assistant Secretary.

(No encl.)

137 EXHIBIT L.

[Divisions of customs. Form 3.]

H. B. J.
9594 *d*.

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
Washington, D. C., Feb. 16, 1885.

A. W. GRISWOLD, Esq.,
155 *Broadway, New York:*

SIR: The Department is in receipt of your letter of the 11th instant relative to discontinuance of certain suits now pending for recovery of illegal customs fees.

In reply, you are informed that the Department has disposed of the case by instructions this day addressed to the collector of customs at New York, N. Y., to whom you are referred for particulars.

Respectfully,

(Signed) H. F. FRENCH,
Assistant Secretary.

(No encl.)

138 EXHIBIT M.

W. W. A.

OFFICE OF THE UNITED STATES ATTORNEY
FOR THE SOUTHERN DISTRICT OF NEW YORK,
New York, Nov. 11th, 1884.

VATABLE *vs.* SCHELL. } O. S. 94.

A. W. GRISWOLD, Esq.,
155 *Broadway, New York:*

SIR: I am in receipt of a letter from the collector of this port in response to mine of the 27th October, ult., in which certain proposed findings of fact were submitted to him with the inquiry as to whether they would furnish a rule for the adjustment of refunds in other similar cases.

The collector states that, while it would be possible to ascertain the number of orders in any given case in the manner suggested by the proposed findings, it would nevertheless be impracticable by reason of the time and labor which would be required. He suggests that some rule should be adopted by which these cases can be inexpensively and expeditiously adjusted in the event of the Department's being willing to acquiesce in the determination of the court.

If you desire to make a proposition to that end I shall be happy to consider it.

Respectfully,
(Sgd.) ELIHU ROOT,
U. S. Attorney.

139 EXHIBIT N.

U. S. CIRCUIT COURT, *Nov. 12th,* 1884.

VATABLE *vs.* SCHELL. } O. S. 94.

DEAR SIR: I have your letter of the 11th inst., in which you refer to one from the collector of customs wherein he states that "while it would be possible to ascertain the number of orders in any given case in the manner suggested in the proposed findings, it would nevertheless be impracticable by reason of the time and labor which would be required," and "he suggests that some rule should be adopted by which these cases can be inexpensively and expeditiously adjusted," &c., &c. I quite agree with the collector that it would be a laborious and consequently an expensive task to adjust the fee cases in the manner in which the auditor finds it can be done and which seems to be the only way in which it can be done with positive exactness. Therefore, my clients are willing to consent to the adoption of a rule by which the cases can be expeditiously and inexpensively adjusted as suggested by the collector. Four experts in this branch of custom-house matters have given their opinions under oath as

to the number of orders in a given case including orders to send packages to public store and to deliver or transfer examined packages from public store as compared with the number of stamps on the invoices in
140 the same entry and they all agree that on consumption entries the average number of such orders would at least equal if it did not exceed the number of stamps on invoices.

And as to the warehouse entries there is some difference of opinion. One of these experts, Daniel Jackson, who was an order clerk at the time, says: "I think the number of warehouse transfer orders for examined packages to bonded warehouse would be about equal to one-third the number of warehouse invoices where there were more than one invoice. Of course, there would be at least one order to each entry."

He seems, in this estimate, to have overlooked the fact that there were orders to send to public stores in warehouse as well as consumption entries.

Mr. Van Vechten, formerly an order clerk and then an entry clerk, estimate the number of orders in case of warehouse goods the same as in consumption, and Mr. More, late and for many years the custom-house clerk of Benkard & Hutton, agrees with Van Vechten.

Mr. Park, for thirty-three years in the custom-house brokerage business, thinks the number of warehouse transfer orders would be nearer one-half than one-third the number of invoices.

But here, again, the estimate is confined to transfer orders, and does not include orders to send to public store, which are just as numerous in warehouse as in consumption entries.

141 Now, I propose, as a basis or rule of adjusting my cases, that on consumption entries there be allowed to plaintiffs as many fees for orders as there are invoices; and on each warehouse entry in which there is but one invoice there will be, of course, one transfer order, and on entries in which there are more than one invoice, half as many orders as there are invoices.

I believe this would be a fair basis of settlement in view of all the evidence.

Yours, &c.,

(S'g'd) ALMON W. GRISWOLD,
Att'y for Pl'ffs.

To ELIHU ROOT, Esq.,
U. S. Attorney.

(3 enclosures to be returned.)

142 EXHIBIT O.

H. B. J.
3324 *d.*

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
Washington, D. C., April 12th, 1883.

COLLECTOR OF CUSTOMS, *New York:*

SIR: Referring to Circulars No. 38, of the 5th instant, promulgating the decision of the Supreme Court of the United States in Cochran vs. Schell, relative to the legality of the exaction of certain custom-house fees, you are instructed to forward the necessary statement for payment of the judgment when entered, and to forward similar statements for repayment of

like fees exacted in other cases, where the requirements of law have been duly complied with.' The payments will be confined to the classes of fees named in the decision.

Suits brought for the recovery of such fees will, so far as they relate to that question, be discontinued without costs, and the certificate of discontinuance will accompany the statement in each case.

These instructions do not relate to any suits involving questions of duties exacted on charges and commissions, as well as to fees, which have been settled, or which may be in the course of settlement, so far as the charges and commissions question is concerned, and wherein the officer of the U. S. attorney's office, who has charge of such cases, shall report
143 that a recovery on a fee question has been waived by the plaintiffs or their attorneys as a condition for settlement of the remainder of the claim.

Very respectfully,

(S'g'd) H. F. FRENCH,
Acting Secretary.

(No enclosures.)
JAN. 3, 1884. (Should be 1885.)

EXHIBIT P.

VATABLE
vs.
SCHELL.

ELIHU ROOT, Esq., *U. S. Att'y:*

D'R. SIR: I have received your exceptions to the auditor's report in this case. They render it necessary to print the case. Have you any choice as to who shall do it? Will you consent that the testimony exhibits and auditor's report be taken from the files in the clerk's office and sent to the printer?

It will save probably $40 or $50 expense of copying. Your early reply will oblige,

Yours, &c..

(S'g'd) A. W. GRISWOLD.

144 EXHIBIT Q.

W. W. A.

OFFICE OF THE UNITED STATES ATTORNEY
FOR THE SOUTHERN DISTRICT OF NEW YORK,
New York, January 6th, 1885.

VATABLE
vs.
SCHELL. } O. S. 94.

A. W. GRISWOLD, Esq.,
Pl'ff's Att'y, 155 *Broadway, New York:*

DEAR SIR: Your letter of the 3d Jan'y, inst., is received. The exceptions to the auditor's report relate solely to the conclusions of law found by him, and no inquiry can be had as to any finding of fact. In whatever way the case may be re-examined it will be as if there had been an agreed

statement of facts. The conclusions of law are based solely on the facts as found, and, therefore, no examination of the evidence will be necessary or proper. It will, therefore, be totally unnecessary to print the evidence or any part of the same.

I have to-day reported the trial of this case to the Secretary of the Treasury, and have recommended that the "fee cases" be adjusted on the basis of settlement proposed by you. In my letter I also suggested that it would be better to determine that question now and before additional expense had been incurred in this case. I therefore suggest to you the
145 propriety of waiting to hear from the Secretary before doing anything further herein.

Respectfully, yours,

(Signed) ELIHU ROOT,
U. S. Attorney.

EXHIBIT R.

JAN. 17, 1885.

ELIHU ROOT, Esq.:

DEAR SIR: Agreeably to your request in your letter Jan. 16th, I herewith enclose a list of cases containing fees. There may be a few others.

I presume you intend to transmit it to the collector. Has the latter been instructed to adjust my cases on the proposed basis?

Yours, &c.,

A. W. GRISWOLD.

146 *List of cases containing "fees."*

O. S.	1370	A. Arnold et al.	vs. Barney.
"	2931	F. Berley	vs. Schell.
N. S.	332	F. Berley	vs. Barney.
"	391	H. Benda et al.	vs. Do.
"	330	E. Blackburn et al.	vs. Do.
O. S.	1623	G. F. W. Bartels et al.	vs. Schell.
"	1188	G. Bunge et al.	vs. Barney.
"	496	L. Curtis et al.	vs. Schell.
"	1369	L. Curtis et al.	vs. Barney.
N. S.	907	H. B. Claflin et al.	vs. Do.
O. S.	338	F. Cottenet et al.	vs. Schell.
"	606	Christ Jay et al.	vs. Do.
N. S.	394	M. H. Cashman et al.	vs. Barney.
O. S.	3007	C. F. Dambmann et al.	vs. Barney.
"	243	H. De Goer et al.	vs. Schell.
O. S.	2924	A. Edwards et al.	vs. Schell.
O. S.	2563	A. Edwards et al.	vs. Redfield.
O. S.	3110	H. J. Fairchild et al.	vs. Barney.
O. S.	2164	Richard Fischer et al.	vs. Schell.
"	380	V. Fauche et al.	vs. Do.
O. S.	407	Galwey, Cassado & Teller	vs. Schell.
"	123	Grandmange et al.	vs. Do.
"	2570	R. C. Greenleaf et al.	vs. Redfield.
"	240	R. C. Greenleaf et al.	vs. Schell.
"	3009	R. C. Greenleaf et al.	vs. Barney.

147	N. S.	326 A. H. Hildick	vs. Barney.
	O. S.	2016 F. A. Hirsch	vs. Do.
N. S.		396 H. Hennequin et al.	vs. Do.
O. S.		337 H. Hennequin et al.	vs. Schell.
"		1621 G. Hessenberg et al.	vs. Do.
O. S.		630 B. H. Hutton, survivor,	vs. Barney.
O. S.		1564 A. Iselin et al.	vs. Schell.
"		2921 D. P. Ives et al.	vs. Schell.
"		2576 D. P. Ives et al.	vs. Redfield.
N. S.		323 E. Kaupe et al.	vs. Barney.
O. S.		2236 G. H. Koop, ex'r., &c.,	vs. Do.
O. S.		3011 Lindsay, D. A., et al.	vs. Barney.
"		1387 Lee, W. H., et al.	vs. Do.
"		323 Lane, D., et al.	vs. Schell.
"		3010 Lehmaier, J., et al.	vs. Barney.
O. S.		387 Munsell, H. H., et al.	vs. Redfield.
"		1006 Morlot, Chas., et al.	vs. Schell.
N. S.		399 Oelrichs, E. A., et al.	vs. Barney.
O. S.		2359 Oppenheim, L., et al.	vs. Do.
"		1458 Pendleton, J. M.,	vs. Barney.
"		3013 Petrie, James S., et al.	vs. Do.
"		2769 Passavant, T., et al.	vs. Do.
O. S.		1447 Poppenhusen, C., et al.	vs. Barney.
"		458 Pollitz, O. W., et al.	vs. Schell.
N. S.		319 A. Rolker et al.	vs. Barney.
O. S.		506 C. Recknagel et al.	vs. Do.
O. S.		3014 A. Rickard	vs. Do.
O. S.		86 A. Rickard	vs. Schell.
O. S.		607 M. A. Sorchan et al.	vs. Schell.
	O. S.	1736 L. Sommerhoff, ex'rs., &c.,	vs. Do.
148	O. S.	621 Schulten & Hurd	vs. Schell.
	O. S.	3012 E. Sully et al.	vs. Barney.
O. S.		2075 J. H. Scrivener	vs. Schell.
N. S.		314 Tomes Sons & Melvin	vs. Barney.
O. S.		2212 C. F. Van Blaukensteyer, et al., ex'rs.,	vs. Barney.
O. S.		2168 Same	vs. Schell.
O. S.		94 Vatable et al.	vs. Schell.
O. S.		78 Vickers, Edward, et al.	vs. Schell.
N. S.		437 Waterbury, Shaw & Co.	vs. Barney.
O. S.		323 J. N. Whiting et al.	vs. Schell.
O. S.		3017 Yard, E., et. al.	vs. Barney.

(Signed) A. W. GRISWOLD,
155 *Broadway, New York.*

EXHIBIT S.

(Copy.)

JAN'Y 20, 1885.

ELIHU ROOT, Esq.,
U. S. Att'y.:

DEAR SIR: You have informed me that the Secretary of the Treasury had accepted my offer of a basis of settlement of the fee cases.

149 May I ask if you will furnish the collector with a copy of my letter, or so much of it as embraces the terms or basis of settlement, and also a copy of the Secretary's letter accepting it?

This will furnish the collector with the means of prosecuting the adjustment of these cases which have been so long awaiting the determination of the Vatable case.

I will feel greatly obliged if you will do this.

Yours &c.,

(Sgd.) A. W. GRISWOLD.

EXHIBIT T.

A. P. UNITED STATES ATTORNEY'S OFFICE,
New York, January 23d, 1886.

VATABLE *vs.* SCHELL. } O. S. 94.

ALMON W. GRISWOLD, Esq.,
Counselor at Law:

SIR: The list of cases containing "fees," received from you the other day, does not entirely agree with the cases as they appear on the dockets of this office. Of course, for official action, it is necessary to have a correct list, and you are invited to call here and to examine the list and to make the necessary corrections.

Very respectfully,

ELIHU ROOT,
U. S. Attorney.

150 EXHIBIT U.

JAN. 24, 1886.

ELIHU ROOT, Esq., *U. S. Att'y:*

DEAR SIR: I have your note, saying the list of fee cases which I sent to you Jan. 17th does not "entirely agree with the cases as they appear on the dockets of your office."

Will you be good enough to indicate which of the cases on my list does not agree with your dockets, and I will strike those cases out of the list and leave the supplemental lists, which I will endeavor to have harmonize with your docket? I suggest this because I think it desirable to get into working order the settlement of the fee cases on the basis of my offer of compromise.

In this connection let me ask that you will consent to withdraw your exceptions to the Auditor's report in the Vatable case or at once print the case for the court and have it disposed of.

Yours, &c.,

A. W. GRISWOLD.

151 EXHIBIT V.

155 BROADWAY, NEW YORK, *Feb.* 11*th*, 1885.

The Hon. SECRETARY OF THE TREASURY,
Washington, D. C.

SIR: On Jan'y 16th, 1885, the U. S. dist. atty. wrote me a letter informing me that the Secretary of the Treasury had authorized the settlement of the fees cases in which I appear as attorney of record, on the basis of the proposition contained in my letter to him dated Nov. 12th, 1884.

The collector of customs states he is without instructions from your Department on the subject. If, as the dist. atty. informs me, you have authorized the settlement of these cases on the basis proposed, will you be good enough to so instruct the collector that he may proceed with the adjustment of the cases which are now in abeyance and no progress toward their settlement can be made, though the basis has been agreed to by the Department.

Very respectfully, your obdt. servt.,

ALMON W. GRISWOLD,
Atty. for Pl'ff's.

152 (Indorsed:) N. S. 399. U. S. circuit court, southern district of New York. E. A. Oelrichs et al. versus Hiram Barney. Defendant's bill of exceptions. Stephen A. Walker, United States attorney, attorney for defendant. Due service of a copy of the within is hereby admitted. New York, 188 . Filed as the bill of exceptions. Allowed by Judge Wallace, October 1, 1887. Nunc pro tunc as of Oct. 24, 1885, as per order of court. Filed as to bill of exceptions allowed by Judge Wheler Oct. 1, 1887. Nunc pro tunc as of Jan'y 18, 1886, as per order of court.

It is agreed that the within bill of exceptions presents the questions decided by Judge Wallace and Judge Wheler in this case. New York, Aug. 16, 1887.

STEPHEN A. WALKER,
U. S. Att'y and Att'y for Deft.
T. G.

A. W. GRISWOLD,
Pl'ff's Att'y.

153 Supreme Court of the United States.

HIRAM BARNEY, PLAINTIFF IN ERROR,
vs.
E. A. OELRICHS & AL., DEFENDANT' IN error.
} Assignment of errors.

Afterwards, to wit, on the second Monday of October, in the same term, before the justices of the said court, at the Capitol in Washington, come the said plaintiff in error, by Stephen A. Walker, his attorney, and says that in the record and proceedings aforesaid there is manifest error in this, to wit, that by the record aforesaid it appears that the judgment aforesaid

in form aforesaid given, was given for the said defendant in error against the said plaintiff in error, whereas by the law of the land the said judgment ought to have been given for the said plaintiff against the said defendant.

And the said plaintiff prays that the judgment aforesaid, for the error aforesaid and other errors in the record and proceedings aforesaid, may be reversed, annulled, and altogether held for nothing, and that he, the said plaintiff, may be restored to all things which he has lost by occasion of said judgment, &c.

STEPHEN A. WALKER,
Attorney for Plaintiff in Error.

154 (Indorsed:) N. S. 399. United States Supreme Court. Hiram Barney, plaintiff in error, vs. E. A. Oelrichs, defendant in error. Assignment of error. Stephen A. Walker, attorney for plaintiff in error. Due service of a copy of the within assignment of error is hereby admitted this 6th day of October, 1887. Almon W. Griswold, attorney for defendant in error. U. S. circuit court. Filed Oct. 6, 1887. Timothy Griffith, cl'k.

155 Supreme Court of the United States.

HIRAM BARNEY, PL'FF IN ERROR,
v.
EDWIN A. OELRICHS, HERMAN C. VON POST, & Gustav Schwab, d'f'ts in error.
} N. S. 399. Joinder in error.

And afterwards, to wit, on the second Monday of October term, the said defendant in error, by Almon W. Griswold, their attorney, come here into court and say that there is no error either in the record or proceedings aforesaid or in the giving of the judgment aforesaid.

And they pray that the said Supreme Court, before the justices thereof, now here may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the
156 judgment aforesaid, in form aforesaid given, may be in all things affirmed, etc.

ALMON W. GRISWOLD,
Att'y for Def'ts in Error, 155 Broadway, New York.

(Endorsed:) N. S. 399. U. S. Supreme Court. Hiram Barney, plff. in error, vs. Edwin A. Oelrichs et al., dfts. in error. Joinder in error. A. W. Griswold, atty. for defts. in error.

Due service of a copy of within joinder in error is hereby admitted, dated October 7, 1886. Stephen A. Walker, attorney for plff. in error. U. S. circuit court. Filed Oct. 8, 1887. Timothy Griffith, clerk.

157 UNITED STATES OF AMERICA, *ss:*

To E. A. Oelrichs, Herman C. Von Post, and Gustav Schwab, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October, eighteen hundred and eighty-seven, pursuant to a

writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Hiram Barney is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Dated Oct. 6, 1887.

E. HENRY LACOMBE,
Circuit Judge.

158 (Indorsed:) N. S. 399. U. S. Supreme Court. Hiram Barney, plaintiff in error, against E. A. Oelrichs & al., defendants in error. Citation. Due service of a copy of the within citation is hereby admitted this 6th day of October, 1887. Almon W. Griswold, attorney for defendants in error. U. S. circuit court, Oct. 6, 1887. Timothy Griffith, clerk.

159 (Indorsed on cover:) No. 177. Hiram Barney, late collector of the port of New York, plaintiff in error, vs. E. A. Oelrichs, Herman C. Von Post, and Gustav Schwab. S. New York. C. C. U. S. Filed October 11, 1887.

Office Supreme Court U. S.
FILED.
JAN 28 1891
JAMES H. McKENNEY.
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1890.

HIRAM BARNEY, LATE COLLECTOR etc., plaintiff in error,
vs.
E. A. OELRICHS ET ALS.
} No. 177.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE PLAINTIFF IN ERROR.

WM. A. MAURY,
Assistant Attorney-General.

Supreme Court of the United States.

OCTOBER TERM, 1890.

HIRAM BARNEY, LATE COLLECTOR, etc., plaintiff in error,
vs.
E. A. OELRICHS ET ALS.
} No. 177.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE PLAINTIFF IN ERROR.

STATEMENT.

This is one of a large number of actions brought by importers against Mr. Barney, a former collector of the port of New York, to recover back money alleged to have been illegally exacted by him as collector by way of duty on certain charges

and commissions and by way of fees for alleged services performed in the custom-house in connection with merchandise imported.

The action was commenced in the superior court of New York City by a summons dated March 27, 1868, which was served on the defendant, April 16, 1868. (p. 2.)

On May 5, 1868, the action was removed into the circuit court of the United States for the southern district of New York by *certiorari*. (p. 3.)

THE PLEADINGS.

The declaration consists of the common counts in assumpsit. (pp. 3, 4.)

The defendant pleaded (1) *non assumpsit*; (2) the statute of limitations, namely, that the plaintiffs' supposed causes of action, or any of them, did not accrue to them at any time within six years next before the commencement of this suit. (p. 5.)

Issue was joined on the plea of *non assumpsit*. (p. 5).

REPLICATION TO THE PLEA OF LIMITATIONS.

The following replication was filed to the plea of limitations:

> And the said plaintiffs, as to the plea of the said defendant by him lastly above pleaded, say that the said plaintiffs, by reason of anything by the said defendant in that plea alleged, ought not to be barred from having and maintaining their aforesaid action thereof against the said defendant, because they say that after the said several causes of action in the said complaint mentioned had accrued to the said plaintiffs the said defendant departed from and resided out of this State for several successive periods, amounting in the aggregate to twelve months, and this suit was brought within six years and twelve months, after the said several causes of action, and each and every thereof accrued to these plaintiffs.
>
> And this the said plaintiffs are ready to verify, wherefore they pray judgment and their damages by them sustained to be adjusted etc. (pp. 5, 6).

REJOINDER TO THE REPLICATION.

To this replication the defendant filed the following rejoinder:

> And the said defendant, as to the said replication of the said plaintiffs to the said second plea of the said defendant, says that the said plaintiffs ought not by reason of anything by them in that replication alleged to have or maintain their aforesaid action against him, the said defendant, because he says that after the said several supposed causes of action in the said complaint mentioned had accrued to the said plaintiffs, and before the commencement of this suit, he, the said defendant, did not depart from and reside out of this State for several successive periods, amounting in the aggregate to twelve months, in manner and form as the said plaintiffs *has* above in their sad replication in that behalf alleged. And of this he, the said defendant, puts himself upon the country, and the said plaintiffs do the like (p. 6).

The plaintiffs joined in the issue tendered by this rejoinder (p. 6).

ORDERS OF REFERENCE.

The various pending cases, of which the case at bar was one, numbering one hundred and five in all, were referred by the court to Hon. Edwards Pierrepont, as referee, but that gentleman having been appointed Attorney-General of the United States, the order was rescinded on December 19, 1876, and a new order entered by the court on that day referring the said causes, in so far as undisposed of, to John I. Davenport, esq., as referee—

> to take proof of and ascertain the claim of the plaintiff or plaintiffs in each of the said several causes, with interest, for excess of duties upon such charges and commissions which may be found to have been illegally exacted from plaintiffs, and paid under protest to defendants, and not barred by the statute of limitations, whenever the same has been pleaded, upon importations at the port of New York, specified in the several bills of particulars served, or to be served in said several causes.

The order further directed the referee to determine and adjust these claims in accordance with the rules and decisions of the court in similar cases so far as applicable, and "that said referee state and report the amounts ascertained by him on said several commissions and charges separately, and the facts found by him in respect

hereto, and in respect to the protests touching the same." The order also provides for the raising of objections and exceptions before the referee and for bringing the same to a hearing before the court after the filing of the referee's report, and that, for that purpose, the referee may be required "to report the evidence or testimony taken in the case upon which the objection or exception arises in such manner as the court shall direct, and copies of the protests filed therein respectively. (pp. 7, 8.)

Afterwards, to wit, on August 10, 1882, the court ordered that such cases as remained unadjusted and not discontinued or not otherwise disposed of, of which number this case was one, should be referred to Joseph M. Deuel, the clerk of the court, instead of John I. Davenport, esq. (p. 9.)

REFEREE'S REPORT.

On October 8, 1884, Mr. Deuel, the referee, filed his report, finding that plaintiffs were entitled to recover $406.85 as and for excessive duties on charges and commissions, and, in addition

ORDERS OF REFERENCE.

The various pending cases, of which the case at bar was one, numbering one hundred and five in all, were referred by the court to Hon. Edwards Pierrepont, as referee, but that gentleman having been appointed Attorney-General of the United States, the order was rescinded on December 19, 1876, and a new order entered by the court on that day referring the said causes, in so far as undisposed of, to John I. Davenport, esq., as referee—

> to take proof of and ascertain the claim of the plaintiff or plaintiffs in each of the said several causes, with interest, for excess of duties upon such charges and commissions which may be found to have been illegally exacted from plaintiffs, and paid under protest to defendants, and not barred by the statute of limitations, whenever the same has been pleaded, upon importations at the port of New York, specified in the several bills of particulars served, or to be served in said several causes.

The order further directed the referee to determine and adjust these claims in accordance with the rules and decisions of the court in similar cases so far as applicable, and "that said referee state and report the amounts ascertained by him on said several commissions and charges separately, and the facts found by him in respect

hereto, and in respect to the protests touching the same." The order also provides for the raising of objections and exceptions before the referee and for bringing the same to a hearing before the court after the filing of the referee's report, and that, for that purpose, the referee may be required "to report the evidence or testimony taken in the case upon which the objection or exception arises in such manner as the court shall direct, and copies of the protests filed therein respectively. (pp. 7, 8.)

Afterwards, to wit, on August 10, 1882, the court ordered that such cases as remained unadjusted and not discontinued or not otherwise disposed of, of which number this case was one, should be referred to Joseph M. Deuel, the clerk of the court, instead of John I. Davenport, esq. (p. 9.)

REFEREE'S REPORT.

On October 8, 1884, Mr. Deuel, the referee, filed his report, finding that plaintiffs were entitled to recover $406.85 as and for excessive duties on charges and commissions, and, in addition

thereto, the sum of $592.46 interest, making an aggregate sum of $999.31. (p. 11.)

Various requests of the referee for findings were made and are presented in his report, with the evidence relevant to them and his action thereon.

EXCEPTIONS AND CONFIRMATION OF REPORT.

The defendant filed exceptions to the referee's report (p. 32), which were overruled by the court, and the report confirmed October 21, 1885 (p. 11); and to this ruling an exception was taken in so far as it confirmed the referee's rulings as to the statute of limitations and the question of interest. (p. 34.)

TRIAL.

On January 18, 1886, the case came on for trial before Judge Wheeler and a jury, the result of which was that the judge directed the jury to find a verdict for the plaintiffs for the amount of $289.12 for fees, to which part of the plaintiffs claim the powers of the referee did not extend under the order of the court. The court also directed the jury to find for the plaintiffs in the

amount of $1,076.74 on the referee's report, to which direction the defendant excepted (p.39). The jury assessed the plaintiffs' damages at $1,365.86, to which was added $134.31 for interest and $85.97 costs, making in all $1,586.14 (p. 12, 13), for which amount judgment was entered (p. 13).

On the trial of that part of the issue which consisted of the claim for *fees* alleged to have been illegally exacted by the defendant from the plaintiffs, various rulings of the court were excepted to, which are set forth in the defendant's bill of exceptions (pp. 34–40).

Thereupon the defendant sued out this writ of error.

ASSIGNMENT OF ERROR.

The judgment, it is conceived, is erroneous, in this, that the circuit court held that the evidence adduced before the referee by the plaintiffs below to sustain the issue on their part joined under the defendant's rejoinder, was sufficient to sustain the averment of the plaintiffs' replication traversed by the said rejoinder, and directed the jury to find for the plaintiffs on that issue.

The question of the statute of limitations is the only question fairly open under this writ of error, and is important because of its bearing on other cases awaiting its determination by this court.

The question as to the collector's authority to assess duty under the act of March 3, 1861 (9 Stat., 629), which was in force at the time the duties here in question were levied, on charges for inland transportation to the place of shipment, was settled, before the trial, against the authority by a considerable weight of opinion in the inferior Federal courts, in which the Treasury Department had formally concurred. (*Tomes* v. *Redfield*, 7 Blatch., 139–145.) It is hardly probable that the interpretation, thus settled, will be overturned by this court, especially as the statute in question has been long repealed.

The question as to the collector's alleged assessment of duty on excessive commissions is not open because the evidence on which the referee acted in that behalf does not accompany his report.

The objection that interest was computed by the referee and the jury upon the excessive duties covered by the verdict is not an open question here. In *Schell* v. *Cochran* (107 U. S. R, 625, 626), and *Schell* v. *Dodge* (*ib.*, 629), this court recognized the propriety of awarding interest by way of damages for the detention of money illegally exacted by a collector in the name of duties.

As to the claim for excessive fees, the Government would seem to be bound by its agreement, as shown by the record, and as was held by the trial judge, that this part of the plaintiffs' claim should be ascertained and liquidated at the custom-house, as was done (p. 39).

THE STATUTE OF LIMITATIONS.

This brings us to the plea of limitations filed by the collector (p. 5).

The plaintiffs, in their replication to this plea (pp 5, 6), set up that after their cause of action had accrued, "the said defendant departed from *and resided out of this State* for several successive periods, amounting in the aggregate to twelve months, and this suit was brought within six

years and twelve months after the said several causes of action, and each and every thereof, accrued to these plaintiffs."

This replication the defendant traversed in his rejoinder and issue was joined on that traverse (p. 6).

At the time the plaintiffs' causes of action accrued the act of February 26, 1845, was in force (5 Stat., 727), and Congress not having yet undertaken to regulate the time during which actions against collectors might be brought, as it afterwards did, by the act of June 30, 1864 (13 Stat., 214), such time was regulated by the State law, the act of 1864 being applicable, necessarily, only to cases that arose after its passage.

The provisions of the limitations law of New York applicable to this case are sections 91 and 100 of the Code of Procedure of 1851. (2 Rev. Stat., N. Y., 4th ed., pp. 497, 498.)

Section 91 provides that "an action upon a contract, obligation, or liability, express or implied, excepting those mentioned in section 90," may be brought within six years. The excep-

tions referred to in this section are judgments, decrees, and sealed instruments.

Section 100 provides that—

> If, when the cause of action shall accrue against any person, he shall be out of the State, such action may be commenced within the terms herein respectively limited after the return of such person into this State; and if, after such cause of action shall have accrued, *such person shall depart from and reside out of this State, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action.*

The record shows that process was served on the defendant on April 16, 1868 (p. 2).

Reckoning backwards, now, we reach the statutory limit of six years on April 16, 1862.

It appears by the bill of exceptions (p. 30) that various items of the alleged excessive duties were each paid by the plaintiffs to the defendant more than six years prior to the commencement of this action, to wit:

1861. May 2, *John Leslie*, paid $32.40, May 2, 1861.
1861. May 17, *Sea Vulture*, paid $0.60, May 17, 1861.
1861. September 19, *August*, paid $0.80, Sept. 19, 1861.
1862. January 29, *Elez. de Hart*, paid $3.00, Jan. 29, 1862.
1862. March 15, *Bremen*, paid $7.50, March 15, 1862.

Each and all, then, of these items is barred by the six-year limitation, unless the plaintiffs have made good, by proof, their replication that the defendant "departed from and resided out of the

State" for a sufficient time to cover those items or some one or more of them.

Having respect to the ordinary meaning of the language of the New York code of procedure, and in the absence of any ruling of the highest court of the State requiring that language to be read in some way different from its natural import, it is not easy to see how the court below could have allowed the issue under the statute of limitations to be found against the plaintiff in error. Indeed, the evidence relied on by the plaintiffs below for the purpose of bringing the defendant within the exception of section 100 was *so weak as to be hardly relevant.*

That evidence was that Mr. Barney, during the time between April 16, 1862, and April 16, 1868, was frequently absent from the State at different times, temporarily, for short periods varying from one day to perhaps forty or fifty days; that very few of these absences, probably not more than two or three, were as long as forty days, and not more than one as long as fifty. They consisted mainly of brief visits to Washington during the first four years, and of visits

to Iowa and Wisconsin and south during the following years.

Now it was upon this flimsy evidence, if we may be pardoned for saying so, that the court below held that, *putting together all Mr. Barney's official visits to Washington and his visits on business and pleasure to other places*, he, who had been *uninterruptedly* a citizen of New York for about fifty years, had, between 1862 and 1868, *departed from and resided out of the State of New York for twelve months*

We concede that any number of *residences* in the proper sense of the code, taking place at different times, may be tacked together, and the sum of them added to the period of the statute of limitations for the purpose of showing that an action was seasonably brought. (*Cole* v. *Jessup*, 10 N. Y. (6 Seld.,) 96; *Ford* v. *Babcock*, 2 Sand., Sup. Ct. R., 518; *Harnden* v. *Palmer*, 2 E. D., Smith, 172, 175).

But the first two cases, which settle this point, turned entirely on the *pleadings*, and not on the evidence adduced in support of them, and we

believe there is no decision of the court of appeals of the State showing what the character of the evidence must be to establish *residence* out of the State, in the sense of the code.

No doubt the learned judge of the court below who overruled the defendant's exceptions to the referee's report followed his own decision in *Hennequin et al.*, v. *Barney*, which is set out in the record. (pp. 32, 33).

In this decision the learned judge says:

> Whatever view might be reached if the question was an open one in this court, its consideration is foreclosed by the decision of this court, Blatchford, J., in *Dale* v. *Barney*. *No opinion was written in that case*, but the question was presented, as it is here, upon exceptions to a referee's report, and the referee has carefully considered it and expressed his views at large.
>
> The court apparently adopted the opinion of the referee. The facts, the findings, and the exceptions were precisely those now before the court, and the decision then made, *holding that the defendant's absences were to be added to the six years, must be deemed controlling in the present case.*

Referring to the evidence in that case, the judge says that the defendant's absences "were not a temporary departure followed by an immediate return," and "that he was not absent with any intent to change his domicile."

It is to be observed that it does not appear whether the evidence in *Hennequin et al.* v. *Barney* and *Dale* v. *Barney* were the same as that given

in this case. Furthermore, it would appear that the case of *Dale* v. *Barney* was relied on to support the view that successive absences may be tacked together, which we admit. But whether or not the eminent judge who sat in *Dale* v *Barney* passed on the question as to what constitutes *residence*, in the sense of section 100 of the Code of Procedure, does not appear. Again, there was no written opinion in *Dale* v. *Barney*, and we may infer from that fact that the question, if passed on, did not receive the deliberate attention of the court

At any rate, the question is open here, and will, no doubt, be decided according to the views of this court as to the meaning of the State law.

In the case of *Hannequin el al.* v. *Barney*, the court cites with approbation the decision of the New York court of common pleas in *Harden* v. *Palmer* (2 E. D. Smith, 172), where it was held that two absences of the defendant of eight and two months in Europe required that ten months should be added to the statutory period, but it is to be observed of this decision that, while it may have been right *on the actual facts*, which are not

reported, it treats *absence from and residence out of the State as convertible terms;* therefore, under this decision, if a defendant *were out of the State only a day* the statute would cease to run as to him for that time, which we submit is an untenable position.

The case *In the matter of Thompson* (1 Wend. 43) cited and relied on by the Court in *Harden* v. *Palmer* (*supra*) involved the meaning of *residence* in the attachment law of New York. The defendant in that case had been in Scotland for *two years* under circumstances showing that he was settled there for an indefinite time, and Chief-Justice Savage in delivering the opinion of the court draws a distinction between *domicile* and *residence*, saying "No length of residence, without the intention of remaining, constitutes *domicile.* A debtor, therefore, by residing abroad, without declaring an intention to remain, might prevent his creditors from ever collecting debts. In my judgment, the present case comes not only within the spirit of the act but also *within its terms.*"

It would seem entirely clear that this case

lends no support whatever to the language in the opinion in *Harden* v. *Palmer*, that mere absence from the State makes a party a non resident. There may be language in the opinion of the Chief Justice that seems to favor this view of the Court in *Harden* v. *Palmer*, but that language must be interpreted in the light of the rest of the opinion and of the case actually before the court. As Chief-Justice Marshal says, in *Cohens* v. *Virginia* (6 Wh. 399, 400), "It is a maxim not to be disregarded that general expressions in every opinion are to be taken *in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.*"

The case *in the matter of Thompson* (*supra*) and other New York cases are regarded by Mr. Drake, in his work on Attachment (§ 65), as supporting his position that *resident* and *inhabitant* are synonymous in foreign attachment legislation.

In *Wheeler* v. *Wheeler* (1 E. D. Smith, 1, 4)

the same court as decided *Harden* v. *Palmer* laid down the law as here contended for. They said that in order to bring a party within the exception of the statute "it was necessary to prove that the debtor departed from the State, and also that he *resided out* of the State. The evidence did not show this. *For aught that is in proof before us, the absence may have been merely temporary; excursions for pleasure or business with a return to this State as the residence of the debtor.*" Tried by this standard, Mr. Barney can not be said to have resided out of the State, as was ruled by the court below.

Indeed, the legislature of New York has shown clearly by an act passed April 25, 1867 (Laws N. Y. 1867, p. 1921), that it did not understand *residence* and *absence* to be convertible, for by that act it amended section 100 of the code of procedure by adding after the words "and reside out of the State" the following words, "*or remain continuously absent therefrom for the space of one year or more*" so that the section amended and reënacted reads as follows, the amendment being in italics:

SEC. 100. If, when the cause of action shall accrue against any person, he shall be out of the State, such action may be commenced within the terms herein respectively limited, after the return of such person into this State; and, if after such cause of action shall have accrued, such person shall depart from and reside out of this State, *or remain continuously absent therefrom for the space of one year or more*, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action.

This act is a clear enunciation of the legislative opinion that mere *absences* from the State, however long, did not stop the running of the statute under the section as unamended, and that *mere absences of any time*, short of a year, do not stop the running of the statute under the section as amended.

Since this expression of the legislative intention the case of *Harden* v. *Palmer* must be considered as overruled.

It seems remarkable that no reference whatever was made to the act of 1867 in the opinion of the court in *Hennequin et al.* v. *Barney*, which was not delivered until July 27, 1885 (p. 32).

The language of the law of Illinois is identical with that of New York, and the words "departs from and resides out of the State" in that law have been recently interpreted by the supreme court of that State in the case of *Pells* v. *Snell*

(130 Ill., 379). We make the following quotation from the opinion of the court:

> The terms of our present statute of limitations, so far as they apply to the questions here raised, differ materially from those of the statute in force prior to the revision of 1872. By the former statute, all the time the defendant was out of the State after the cause of action had accrued and before the commencement of the action, however temporary the absence or for whatever purpose, might be deducted. (Rev. Stat., 1845, chap, 66, sec. 13; Vallandingham *v.* Huston, 4 Gilm., 125; Chenot *v.* Lefevre, 3 *id.*, 637.) By section 18 of the act of 1872, it is provided that if, after the cause of action accrues, the defendant "departs from and resides out of the State," the time of his absence shall not constitute any part of the time limited for the commencement of the action.
>
> The signification of the word "reside," as used in the present statute, presents a question not altogether free from difficulty. Numerous definitions of residence are to be found in the books, differing from each other mainly in respect to the greater or less degree of permanence of the inhabitancy or abode which they involve. (See Abbott's Law Dict., title, Reside.) There seems, however, to be a substantial agreement that residence means a fixed and permanent abode or dwelling-place, at least for the time being, as contradistinguished from a mere temporary locality of existence. (*Matter of Wrigley*, 8 Wend., 134.) Thus, it is held in *Frost* v. *Brisbin* (18 Wend., 512), that a temporary sojourn within a State for pleasure or business, accompanied by an intention to return to the State of one's former inhabitance, does not constitute residence.
>
> The instruction above recited seems to hold that the sufficient and only test by which to determine whether Pells was residing out of the State within the meaning of the statute was to be found in the length of his absence, wholly irrespective of whether he in fact retained his residence in the State, as the evidence for the defense tended to show, or whether he established for himself any fixed abode or dwelling-place in another State, either permanent or otherwise. To this view we are unable to give our assent. Mere absence from the State, however protracted, is not sufficient to constitute a residence elsewhere. A person continually traveling from place to place in other States or foreign countries, even if he has abandoned his residence here, can not be said to have acquired a residence, or to be residing in any other place. Residence necessarily involves the idea of a local habitation or place of abode, and unless such abode is established or acquired no length of absence can be held to constitute residence abroad.
>
> In several of the other States, whose statutes of limitations are identical so far as the provision under consideration is con-

cerned, with our present statute, it has been held that occasional and temporary absences from the State, however long continued, if they were not of such character as to change the party's domicile, are not to be deducted in computing the statutory term fixed for the limitation of an action. Such was the rule laid down in Massachusetts in *Collector* v. *Halley* (6 Gray, 517) and *Langdon* v. *Doud* (6 Allen, 423), the statute of that State providing that the time of a defendant's absence should be deducted in case "he is absent from and resides out of the State." The statute of the State of Vermont was in the same words, and the same construction was put upon it in *Hackett* v. *Kendall* (23 Vt., 275) and *Hall* v. *Nasmith* (28 id., 791). The same construction has been put upon the same language in Maine, *Drew* v. *Drew* (37 Me., 389). (See also *Ford* v. *Babcock*, 2 Sandf., 518; *Wheeler* v. *Webster*, 1 E. D. Smith, 1; *Harden* v. *Palmer*, 2 id., 172; *Gilman* v. *Cutts*, 27 N. H., 348).

We would not be understood as adopting the doctrine of the decisions above cited to the extent of holding that there must be an actual change of the party's domicile, in the strict legal sense of that word, that is, an abandonment of his domicile in this State and the acquisition of a domicile elsewhere, to bring him within the meaning of our statute of limitations, all we intend to hold being that he must acquire a fixed and permanent abode or dwelling-place out of this State, at least for the time being.

As the supreme court of Illinois shows, the supreme courts of Massachusetts, Maine, Vermont, and New Hampshire hold, under similar statutes, that nothing short of a change of domicile is a residence.

It is unnecessary to lengthen this brief by referring particularly to those cases, which the court will, no doubt, examine.

It is not necessary to contend here that the law of New York contemplates a change of domicile, it is enough to contend that a party may be

absent from the State, as Mr. Barney was, for merely temporary purposes, without being said to *reside* out of the State.

It seems like an abuse of language to say that a citizen of New York, who passes six months traveling in Europe and then returns home, has been residing in Europe, and yet this seems to be the necessary result of the ruling of the court below.

It is submitted that there appears to be enough in the record to call for a reversal of the judgment.

WM. A. MAURY,
Assistant Attorney-General.

Office Supreme Court U. S.
FILED.
JAN 29 1891
JAMES. H. McKENNEY.
CLERK.

Supreme Court of the United States.

No. 177.

HIRAM BARNEY, LATE COLLECTOR, PLAINTIFF IN ERROR,

vs.

ED. A. OELRICHS.

BRIEF FOR DEFENDANT IN ERROR.

The only question for discussion in this case, as is conceded by counsel for plaintiff in error, is that pertaining to the statute of limitations.

The time within which importers and others might bring actions against the collector not having been regulated by Congress at the date these various causes of action herein accrued, the State statute then in force must govern.

By section 91 of the Code of Procedure of 1851 (2 Rev. Stats., N. Y., 4th ed., p. 497) it is provided that actions upon contracts, etc., may be brought within six years after the cause of action accrues. Section 100 is as follows:

"If, when the cause of action shall accrue against any person, he shall be out of the State, such action may be commenced within the terms herein respectively limited after the return of the person into this State, and if, after such cause of action shall have accrued, such person shall depart from and reside out of this State, the time of his absence

shall not be deemed or taken as any part of the time limited for the commencement of such action."

Summons was served upon defendant April 16, 1868 (p. 2).

Prior to April 16, 1862, $44.30 excess had been paid (p. 16), none of which, however, had been paid more than six years, and twelve months prior to the date on which the summons was served, the earliest payment for which recovery is sought having been made on May 2, 1861 (p. 16).

Defendant Barney admits (pp. 17, 26) that from April 10, 1861, to April 10, 1868, his absences from the State of New York, all of which he denominates as merely "temporary," would average two months a year.

Whether such absences were sufficient to stay the running of the statute depends entirely upon the construction placed upon the words "and reside out of the State" by the courts of the State of New York, for it is familiar law that this court in construing State statutes will adopt the construction made by the courts of the State by whose Legislature the statute was enacted.

In the case of *Burroughs* v. *Bloomer* (5 Denio, 532) Judge McKissock, in construing this statute, held that—

"The expressions 'and reside out of the State' and 'the time of his absence' have the same meaning—they are correlative expressions—so that while the defendant in this case *resided out* of he was *absent from* the State."

And this notwithstanding the fact that the defendant was frequently within the State for short periods.

In the case of *Didier* v. *Davidson* (2 Barb., Ch. R., 477) it was held that where a cause of action has accrued against

a defendant who departs out of the State each period of his *absence*, when there are several, must be deducted in determining whether the statutory term of limitation has expired.

In the matter of Thompson, 1 Wend., 43, where, under the absconding debtors' act (N. Y.), which allowed the attachment of goods of *non-residents*, the contention was that *absence* without the State, ~~although the domicile or mere residence of the absentee was within it~~, was within the contemplation of the statute, it was held by Chief Justice Savage that the object of the act was to allow creditors to prosecute for debts when debtors were abroad, whether their absence was *permanent* or *temporary*, it being intended to afford a remedy to creditors when debtors could not be served with process.

"This," said Daly, J., in case of *Harden* v. *Palmer*, 2 E. D. Smith, 172, quoting the above language, "was, in effect, declaring that *absence* from the State at the time the property was attached was *residing out of the State* within the meaning of these words, and I see no reason why the construction thus given to the words, when used in this particular act, may not be taken as equally explanatory of the sense in which they are employed in the statute under consideration."

See *Cole* v. *Jessup*, 10 N. Y., 96.

In *Denny* v. *Smith* (18 N. Y., 567), Allen, J.:

"I think it was the manifest intention of the Legislature to subject every debtor, during a period of six years after the accruing of a debt, to the reach of civil process at the suit of his debtor."

To accomplish this surely requires that every absence, no matter what its duration, should be deducted in computing the period of limitation.

In *Cutler vs. Wright*, 22 N. Y., 473, to an action upon a promissory note the defendant pleaded the statute of limitations. The plaintiff, by way of replication, set up various *absences* on the part of the defendant and averred that he, defendant, "was not a resident of or present in the State of New York for a term of six years in the aggregate after maturity of said note and before the commencement of this action," but that "he *departed out of* and *continued absent* therefrom," &c.

To such replication defendant demurred, and on hearing judgment was given for the plaintiff on the demurrer, with leave to withdraw the same and plead. The defendant declined to do this, and "on the trial of the issue of fact raised in the action" verdict was given for plaintiff and judgment entered thereon.

Davies, J.: The facts as to absences were admitted by the demurrer and plaintiff was not called upon to prove them at the trial. "They established the fact that the aggregate *absences* of the defendant, deducted from the time the cause of action accrued to that of the commencement of this suit, took the case entirely out of the operation of the statute."

Selden, J., cited cases above referred to, and held that the right of plaintiff to accumulate successive *absences* and to deduct the aggregate thereof in computing the period of limitation must be considered as settled.

And in the case of *Martin* vs. *Platt* (51 Hun., 436), decided in 1889, where the defense "proceeded upon the theory that so long as Platt (defendant) did not intend to change his

residence and did not vote anywhere else except in New York or describe himself as a resident of any other place than New York or was never absent continuously for one year at a time and because he was obliged to go out of the State to find employment and had no intention of remaining away permanently, the statute was running in his favor during the whole of his absence," the court, citing *Denny* vs. *Smith, supra,* held that the plea of the statute "had no merit, for the reason that he (defendant) is shown to have departed from the State, and remained absent therefrom for a period which prevented the application of the statute." Mere *absence* of the debtor suspends the running of the statute, for the "statute contemplates actual *absence.*"

The uniform construction thus placed upon this statute has been such as will subject a debtor to the reach of civil process at the suit of his creditor for the full period of six years, deducting all absences before he can avail him of the statutory bar. The creditor is not to be deprived of the right to collect his debt by operation of the statute, except where having the opportunity of prosecuting his debtor for the *full period* of *six years* he suffers that length of time to pass by without commencing his action. The creditor

"cannot be said to have this opportunity unless the creditor (debtor) has been in the State for six years, so as to be *at any time* during that period within the reach of process."

Harden v. *Palmer*, 2 E. D. Smith, 172.

This construction of the State courts has been adopted and followed by the U. S. Circuit Court.

Henneguin *v.* Barney (Opinion of Wallace, J., at p. 32, Record).

Barney *v.* Dale. (No written opinion.)

And, it is respectfully submitted, should be sustained by this court.

S. F. PHILLIPS,
F. D. MCKENNEY,
Attorneys for Defendants in Error.